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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 236

RAE BROOKS, PLAINTIFF IN ERROR,

vs.

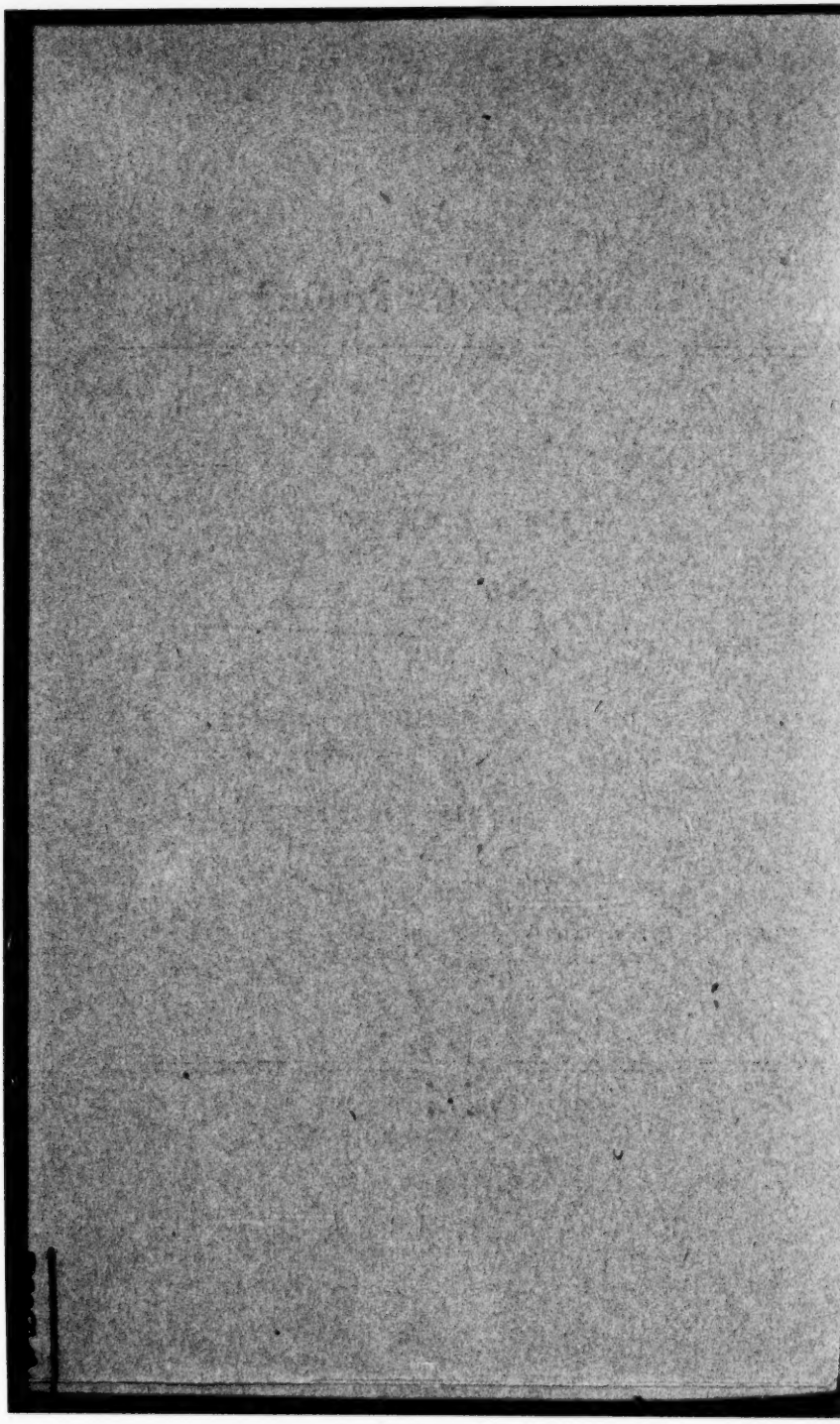
THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA

C. 89. Oct 17, 1919 41 Stat 3

FILED FEBRUARY 12, 1924

(30,121)



(30,121)

SUPREME COURT OF THE UNITED STATES

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1924

[fols. 1 & 2] CITATION—In usual form, showing service on E. D. Barron; filed Dec. 10, 1923; omitted in printing

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[fol. 3] **IN UNITED STATES DISTRICT COURT**

RAE BROOKS, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error

WRIT OF ERROR AND RETURN—Filed Dec. 10, 1923

The President of the United States to the Honorable the Judge of District Court of the United States for the District of South Dakota, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, Plaintiff being the Defendant in Error herein, and Rae Brooks defendant, being the plaintiff in error herein, a manifest error hath happened, to the great damage of the said Rae Books, as by his complaint appears, we being willing that error, if any hath happen, should be duly corrected and full and speedy justice done to him, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington, D. C., within sixty days from the date hereof, in said Supreme Court to be then and there held, that, the said record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the said Supreme Court, this 10th day of December, A. D. 1923.

Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota.

Allowed: Jas. D. Elliott, District Judge.

[fol. 4] UNITED STATES OF AMERICA,
Southern Division,
District of South Dakota, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified tran-

script of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the District Court, at office in the city of Sioux Falls, this 30th day of January, A. D. 1924.

Jerry Carleton, Clerk. (Dist. Court Seal, Dist. of South Dakota.)

[fol. 5] IN UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

THE UNITED STATES, Plaintiff,

vs.

RAE BROOKS, Defendant

INDICTMENT No. 2007—Filed Oct. 20, 1922

Be it remembered, that on 20th day of October, A. D. 1922, the Grand Jury came into Court and presented to the Court and filed an indictment against Rae Brooks, charging him with the crime of unlawfully transporting and causing to be transported in inter state commerce a certain stolen automobile, and unlawfully receiving, concealing and storing a certain stolen automobile which was moving as and a part of interstate commerce; which said indictment is in words and figures the following, to-wit:

[fol. 6] The District Court of the United States of America for the Southern Division of the District of South Dakota, in the Eighth Judicial Circuit.

At a stated term of the District Court of the United States of America for the Southern Division of the District of South Dakota, begun and held at the City of Sioux Falls, within and for the District and Circuit aforesaid, on the third Tuesday of October, in the year of our Lord one thousand nine hundred and twenty-two, the Grand Jurors of the United States of America, good and lawful men, summoned from the body of the District aforesaid, then and there being duly empaneled, sworn and charged by the Court aforeasid, to diligently inquire and true presentment make for said District of South Dakota, in the name and by the authority of the United States of America, upon their oaths, do present:

That Rae Brooks, late of Sioux Falls, in said District, heretofore, to-wit: on or about the sixth day of January, in the year of our Lord one thousand nine hundred and twenty-two, at Sioux Falls, in the County of Minnehaha, in the State and District of South Dakota, and in the Southern Division thereof, and within the exclusive jurisdiction of this Court, then and there knowingly, unlawfully and feloniously did transport and cause to be transported

in interstate commerce from Sioux City, in the State of Iowa, to Sioux Falls, in the State of South Dakota, a certain motor vehicle, [fol. 7] to-wit: one Nash touring automobile, serial No. 32380, starter No. 961979, generator No. 973179, of the value of One Thousand Dollars ($1,000.00), the property of and belonging to one W. C. Wendt of Omaha, Nebraska, which said automobile theretofore on or about the seventh day of September A. D., 1921 had been stolen from the said W. C. Wendt, nor did the said Rae Brooks then and there have the consent and permission of the owner of said automobile to transport and cause to be transported the said automobile from Sioux City, in the State of Iowa, to Sioux Falls, in the State of South Dakota, all of which he, the said Rae Brooks, then and there well knew, contrary to the form, force and effect of the statute of the United States in such case made and provided and against the peace and dignity of the United States of America.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say:

That Rae Brooks, late of Sioux Falls, in said District, heretofore, to-wit: on or about the sixth day of January, in the year of our Lord one thousand nine hundred and twenty-two, at Sioux Falls, in the County of Minnehaha, in the State and District of South Dakota, and in the Southern Division thereof, and within the exclusive jurisdiction of this Court, then and there knowingly, unlawfully and feloniously did receive into his possession, conceal and store a certain Nash touring automobile, which said Nash auto- [fol. 8] mobile was moving as and which was then and there a part of interstate commerce, which automobile having been theretofore transported in interstate commerce from Sioux City, in the State of Iowa, to Sioux Falls, in the State of South Dakota, and which said automobile is more fully described as follows, to-wit: one Nash touring automobile, serial No. 32380, started No. 961979, generator No. 973179, of the value of One Thousand Dollars ($1,000.00), the property of and belonging to one W. C. Wendt of Omaha, Nebraska, nor did the said Rae Brooks then and there have the consent and permission of the owner of said Nash automobile to receive into his possession, conceal and store the same, and which said automobile theretofore on or about the seventh day of September A. D., 1921, had been stolen from the said W. C. Wendt, all of which he, the said Rae Brooks, then and there well knew, contrary to the form, force and effect of the statute of the United States in such case made and provided and against the peace and dignity of the United States of America.

S. W. Clark, United States Attorney for the District of South Dakota.

Names of witnesses sworn and examined before the Grand Jurors: W. C. Wendt, Werner Hanni, W. S. Campbell.

[fol. 9] [File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

INDICTMENT NO. 2008—Filed Oct. 17, 1919

The District Court of the United States of America for the Southern Division of the District of South Dakota, in the Eighth Judicial Circuit.

At a stated term of the District Court of the United States of America for the Southern Division of the District of South Dakota, begun and held at the City of Sioux Falls, within and for the District and Circuit aforesaid, on the third Tuesday of October, in the year of our Lord one thousand nine hundred and twenty-two, the Grand Jurors of the United States of America, good and lawful men, summoned from the body of the District aforesaid, then and there being duly empaneled, sworn and charged by the Court aforesaid, to diligently inquire and true presentment make for said District of South Dakota, in the name and by the authority of the United States of America, upon their oaths, do present:

That Rae Brooks, late of Sioux Falls, in said District, heretofore, to-wit: On or about the sixth day of January, in the year of our Lord one thousand nine hundred and twenty-two, at Sioux Falls, in the County of Minnehaha, in the State and District of South Dakota, and in the Southern Division thereof, and within the exclusive jurisdiction of this Court, then and there knowingly, unlawfully, and feloniously did transport and cause to be transported in interstate commerce from Sioux City, in the State of Iowa, to Sioux [fol. 11] Falls, in the State of South Dakota, a certain motor vehicle, to-wit: one Nash automobile, serial number 128183, engine # 13621, starter #12616098, generator #12515811 of the value of One Thousand Dollars ($1,000.00), the property of and belonging to one A. E. Traschler of St. Joseph, Missouri, which said automobile theretofore on or about the sixth day of November, A. D. 1921, had been stolen from the said A. E. Traschler, nor did the said Rae Brooks then and there have the consent and permission of the owner of said automobile to transport and cause to be transported the said automobile from Sioux City, in all the State of Iowa, to Sioux Falls, in the State of South Dakota, all of which he, the said Rae Brooks, then and there well knew, contrary to the form, force and effect of the statute of the United States in such case made and provided and against the peace and dignity of the United States of America.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say:

That Rae Brooks, late of Sioux Falls, in said District, heretofore, to-wit: on or about the sixth day of January, in the year of our Lord one thousand nine hundred and twenty-two, at Sioux Falls, in the County of Minnehaha, in the State and District of South Dakota, and in the Southern Division thereof, and within the exclusive juris-

diction of this Court, then and there knowingly, unlawfully and feloniously did receive into his possession, conceal and store a certain Nash automobile, which said Nash automobile was moving as and which was then and there a part of interstate commerce, said [fols. 12 & 13] automobile having been theretofore transported in interstate commerce from Sioux City, in the State of Iowa, to Sioux Falls, in the State of South Dakota, and which said automobile is more fully described as follows, to-wit: one Nash automobile, serial number 128183, engine #16213, starter #12616098, generator #12515811, of the value of One Thousand Dollars ($1,000.00), the property of and belonging to one A. E. Traschler of St. Joseph, Missouri, nor did the said Rae Brooks then and there have the consent and permission of the said owner of said Nash automobile to receive into his possession, conceal and store the same, and which said automobile theretofore on or about the sixth day of November, A. D. 1921 had been stolen from the said A. E. Traschler, all of which the said Rae Brooks then and there well knew, contrary to the form, force and effect of the statute of the United States in such case made and provided and against the peace and dignity of the United States of America.

S. W. Clark, United States Attorney for the District of South Dakota.

Names of witnesses sworn and examined before the Grand Jurors: Werner Hanni, W. S. Campbell.

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER TO COUNT TWO OF INDICTMENT NO. 2007—Filed Oct. 16, 1923

Comes now, the defendant, Rae Brooks, and demurs to Count Two of the indictment returned and filed in the above entitled action on the 20th day of October, 1922, for the reason that the Count and the matters therein contained, in the manner and form as the same are stated and set forth, are not sufficient in law; that the grounds on which said demurrer is founded are as follows:

I

That said Count of said indictment does not state facts sufficient to constitute a public offense.

II

That said Count of said indictment does not state facts with sufficient definiteness to apprise the defendant, with reasonable cer-

tainty of the nature of the accusation against him or to enable him to prepare his defense.

III

That the Act of Congress, approved October 17, 1919, and otherwise known as the "National Motor Vehicle Theft Act," under and by virtue of which act of Congress said Count of said indictment is founded, is without force and effect, and unconstitutional and is an [fol. 15] attempt by the Congress of the United States to legislate on a matter, the subject of which legislation is wholly reserved to the respective states of the Union, and therefore violates the Tenth Amendment to the Constitution of the United States.

Dated at Sioux Falls, South Dakota, October 16th, 1923.

Bielski, Elliott & Marker, Attorneys for Defendant

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER TO COUNT ONE OF INDICTMENT NO. 2007—Filed Oct. 17, 1923

Comes now the defendant, Rae Brooks, and demurs to Count One of the indictment returned and filed in the above entitled action on the 20th day of October, 1922, for the reason that the said count and the matters therein contained, in the manner and form as the same are stated and set forth are not sufficient in law; that the grounds on which said demurrer is founded are as follows:

I

That said Count of said indictment does not state facts sufficient to constitute a public offense.

II

That said Count of said indictment does not state facts with sufficient definiteness to apprise the defendant, with reasonable certainty of the nature of the accusation against him, or to enable him to prepare his defense.

III

That the Act of Congress approved October 17, 1919, and otherwise known as the "National Motor Vehicle Theft Act," under and by virtue of which act of Congress said Count of said indictment is [fol. 17] founded, is without force and effect and unconstitutional

and is an attempt by the Congress of the United States to legislate on a matter, the subject of which legislation is wholly reserved to the respective states of the Union, and therefore violates the Tenth Amendment to the Constitution of the United States.

Dated this 16 day of October, 1923.

Bielski, Elliott & Marker, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER TO INDICTMENT No. 2008—Filed Oct. 17, 1923

Defendant, Rae Brooks, demurs to Count One of the indictment returned and filed against him in the above entitled action on October 20, 1922 for the following reasons:

1. That said Count does not state any facts showing this defendant to be guilty of any public offense under the laws of the United States and does not inform him of the nature and cause of the accusation made against him as required by Article 6 of the Bill of Rights of the Federal Constitution.

2. That the Act of Congress approved October 17, 1919, and otherwise known as the "National Motor Vehicle Theft Act," under and by virtue of which act of Congress said Count of said indictment is founded, is without force and effect and unconstitutional and is an attempt by the Congress of the United States to legislate on a matter, the subject of which legislation is wholly reserved to the respective states of the Union, and therefore violates the Tenth Amendment to the Constitution of the United States.

Defendant demurs to Count Two of said indictment for the following reasons:

a. That said Count does not state any facts showing this defend-[fol. 19] ant to be guilty of any public offense under the laws of the United States and does not inform him of the nature and cause of the accusation made against him as required by Article 6 of the Bill of Rights of the Federal Constitution.

b. That the Act of Congress approved October 17, 1919, and otherwise known as the "National Motor Vehicle Theft Act," under and by virtue of which act of Congress said Count of said indictment is founded, is without force and effect and unconstitutional and is an attempt by the Congress of the United States to legislate on a matter, the subject of which legislation is wholly reserved to the

respective states of the Union, and therefore violates the Tenth Amendment to the Constitution of the United States.

Wherefore this defendant demands that he be discharged without day.

Bielski, Elliott & Marker, Kirby, Kirby & Kirby, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 20 & 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING DEMURRER NO. 2007—Filed Oct. 17, 1923

The issue raised by the demurrer to each of the counts of the indictment coming on regularly for trial, and it appearing to the court that each of said counts is sufficient, under the law, to apprise the defendant of the nature and cause of the accusation against him.

Now, therefore, it is ordered that said demurrer as to each count in said indictment be, and the same is hereby overruled. To which ruling the said defendant then and there excepts, and said exception is hereby settled and allowed.

By the Court:

Jas. D. Elliott, Judge.

Attest: Jerry Carleton, Clerk, by C. C. Schwarz, Deputy. (Seal of Court.)

[File endorsement omitted.]

[fols. 22 & 23] [Title omitted]

ORDER OVERRULING DEMURRER NO. 2008—Filed Oct. 17, 1923

The issue raised by the demurrer to each of the counts of the indictment coming on regularly for trial, and it appearing to the court that each of said counts is sufficient, under the law, to apprise the defendant of the nature and cause of the accusation against him.

Now, therefore, it is ordered that said demurrer as to each count in said indictment be, and the same is hereby overruled. To which ruling the said defendant then and there excepts, and said exception is hereby settled and allowed.

By the Court:

Jas. D. Elliott, Judge.

Attest: Jerry Carleton, Clerk, by C. C. Schwarz, Deputy, (Seal of Court.)

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

No. 2007, S. D.

UNITED STATES OF AMERICA, Plaintiff,

vs

RAE BROOKS, Defendant

No. 2008, S. D.

UNITED STATES OF AMERICA, Plaintiff,

vs

RAE BROOKS, Defendant

ORDER OF CONSOLIDATION—Filed Oct. 24, 1923

It appearing to the Court that the defendant, Rae Brooks, in the above entitled proceedings, has been indicted therein by a Grand Jury for two or more acts or transactions connected together and for acts of the same class of crimes and offences and which may be properly joined, now, on motion of S. W. Clark, United States Attorney for the District of South Dakota, made in open court and in the presence of the defendant, Rae Brooks, and of his counsel. It is ordered that the above entitled cause be consolidated for trial.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 24th day of October, 1923.

By the Court:

Jas. D. Elliott, Judge.

Attest: Jerry Carleton, Clerk. (Seal of Court.)

[fol. 25] [File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT, No. 2007—Filed Oct. 27, 1923

We, the jury, in the above entitled case, find the defendant guilty as charged in the indictment.

E. M. Quinn, Foreman.

Dated October 27, 1923.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT, No. 2008—Filed Oct. 27, 1923

We, the jury, in the above entitled case, find the defendant guilty as charged in the indictment.

E. M. Quinn, Foreman.

Dated October October 27, 1923.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed Dec. 10, 1923

Now comes the defendant, Rae Brooks, and moves this Court that this Court arrest and that judgment do not go against him upon the verdicts returned by the jury on any of the counts in the respective indictments presented in this action for the following reasons:

1. That the National Motor Vehicle Theft Act is unconstitutional; that no power is delegated to Congress under the Constitution authorizing it to pass such legislation and that such act is an interference with the power, under the Constitution, reserved to the respective states.

2. That said indictment and the respective counts thereof, do not state facts showing this defendant violated any laws of the United States and does not inform him, as required by the Constitution, of the nature and cause of the accusation against him and particularly,

a. That said indictment does not state the name of the thief who is alleged to have stolen the respective cars and does not state that his name was to the grand jury unknown.

b. That such indictment does not show where such theft, if any, took place.

c. That such indictment does not state any facts showing such cars to have been stolen by anyone, but is confined to the bare conclusion that such cars were so stolen.

[fol. 29] 3. That the second counts of said indictment, are in addition to the foregoing matters set forth, defective in that they seek to charge the acts set forth in the first count as constituting a separate and distinct offense, namely, storing, concealing and receiving the same car which he is accused of having received in the State of Iowa and moved into the State of South Dakota.

4. That said indictments failed to state with any definiteness and certainty that Mr. Brooks had knowledge of the theft of such cars at the time he received or had the same.

5. That the evidence fails to show that Mr. Brooks was guilty of the matters and things set forth in the indictments and fails to show that he had or could have had any knowledge that the cars were stolen at the time he received the same.

6. That the statements to him by the different officers in Sioux Falls and Virgil were made by men, who, at the time, stated they had no knowledge of the theft of such cars, but only surmised the same.

7. That the possession of stolen property shortly after the theft may be evidence that the party having such property is the thief, but is not evidence against a receiver that he knew the same to have been stolen.

Respectfully submitted, Kirby, Kirby & Kirby, R. A. Bielski, Attorneys for Defendant.

[fol. 30] [File endorsement omitted.]

[fols. 31 & 32] In United States District Court

[Title omitted]

Order Overruling Motion in Arrest of Judgment—Filed Dec. 10, 1923

The Court having heard and considered the Motion and Arrest of Judgment filed in this case and good cause to this Order appearing. Now, Therefore, it is ordered that said Motion be and the same is hereby in all things denied by the Court.

Jas. D. Elliott, Judge.

Attest: Jerry Carleton, Clerk. (Seal of Court.)

To the above Order the Defendant duly accepts and said Execution is hereby settled.

Jas. D. Elliott, Judge.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed Dec. 10, 1923.

Now on this the 10th day of December A. D. 1923, the Assistant United States District Attorney and the above named defendant, Rae Brooks, with his counsel, came into Court, and this being the day fixed by the Court for pronouncing judgment upon the conviction of the crime of unlawfully transporting and causing to be transported in interstate commerce a certain stolen automobile, as charged in Count One of the Indictment, No. 2007 So. Div., unlawfully receiving, concealing and storing a certain stolen automobile which was moving as and a part of interstate commerce, as charged in Count Two of the Indictment, No. 2007 So. Div., unlawfully transporting and causing to be transported in interstate commerce a certain stolen automobile, as charged in Count One of the Indictment, No. 2008 So. Div., and unlawfully receiving, con-[fol. 34] cealing and storing a certain stolen automobile which was moving as and a part of interstate commerce, as charged in Count Two of the Indictment, No. 2008 So. Div., the said defendant is now asked by the Court if he has any legal cause to show why the judgment of the law upon said conviction should not be pronounced against him. And the said defendant now answers that he has no cause to show, and the said defendant having been duly convicted of the crime of unlawfully transporting and causing to be transported in interstate commerce a certain stolen automobile, as charged in Count One of the Indictment, No. 2007 So. Div., unlawfully receiving, concealing and storing a certain stolen automobile which was moving as and a part of interstate commerce, as charged in Count Two of the Indictment, No. 2007 So. Div., unlawfully transporting and causing to be transported in interstate commerce a certain stolen automobile, as charged in Count One of the Indictment, No. 2008 So. Div., and unlawfully receiving, concealing and storing a certain stolen automobile which was moving as and a part of interstate commerce, as charged in Count Two of the Indictment, No. 2008 So. Div., in said United States District Court for the District of South Dakota.

It is now by the Court here considered, ordered and adjudged and the sentence of the Court is that you, Rae Brooks, be imprisoned in the United States Penitentiary, situated at Leavenworth, Kansas, for and during the term or period of eighteen months, under Count One of the Indictment, No. 2007 So. Div.; that you, Rae Brooks,

be imprisoned in the United States Penitentiary, situated at Leavenworth, Kansas, for and during the term or period of eighteen months, under Count Two of the Indictment, No. 2007 So. Div.; that you, [fol. 35] Rae Brooks, be imprisoned in the United States Penitentiary, situated at Leavenworth, Kansas, for and during the term or period of eighteen months, under Count One of the Indictment, No. 2008 So. Div.; and that you, Rae Brooks, be imprisoned in the United States Penitentiary, situated at Leavenworth, Kansas, for and during the term or period of eighteen months, under Count Two of the Indictment, No. 2008 So. Div., the terms of imprisonment to run concurrently, there to be kept, fed and clothed according to the laws regulating said prison, and while so confined you shall be exclusively under the control of the officer or officers having lawful charge of said prison, and that you stand committed to said Penitentiary until this sentence be complied with.

[fol. 36 & 37] In United States District Court

[Title omitted]

Affidavit of Rae Brooks—Filed December 10, 1923

I, Rae Brooks, being first duly sworn, do on oath depose and say, that I am the defendant in this action and that at the time of the trial I had no recollection or knowledge of the fact that I had shown the bills of sale at issue in this case to Wilson Powers and it was not until long after the trial and verdict of guilty was returned that said Wilson Powers reminded me of that fact; that upon his calling my attention to the same, I remembered of having the conversation with him he mentions and that the facts are, in this respect, the same as stated in the affidavit of Mr. Powers.

Ray S. Brooks.

[File endorsement omitted.]

[fol. 38] In United States District Court

Affidavit of Wilson Powers—Filed December 10, 1923

Wilson Powers being first duly sworn on his oath deposes and says that for the past forty (40) years he has been a resident of Minnehaha County, South Dakota and for the past eight (8) years has been a resident of the City of Sioux Falls.

Affiant further states that he has been well and personally acquainted with Rae Brooks for several years last passed and that while said Rae Brooks maintained and managed a garage and auto-accessory business in the City of Sioux Falls affiant was a customer of said Rae Brooks.

Affiant further states that on or about the 9th day of January, 1922, in the forenoon of said day, affiant went to the business place of said Rae Brooks, known as the Brooks Building, in the City of Sioux Falls with the view of purchasing from the said Rae Brooks a set of batteries to be used in the operation of the door bell in the residence of affiant. That previous to said occasion affiant and said Rae Brooks had had several conversations relative to the trade of automobiles. That affiant was at that time the owner of a certain Paige automobile. Affiant further states that during the conversation had with the said Rae Brooks on the occasion hereinabove referred to, to-wit: On or about the 9th day of January, 1922, the said Rae Brooks again bantered affiant for a trade of automobiles and then and there said Rae Brooks informed affiant that he had just purchased two Nash automobiles in the City of Sioux City and that such [fol. 39] automobiles were then on one of the upper stories of said Brooks building. That thereupon affiant and said Rae Brooks examined said automobiles and in the examination thereof, affiant inquired of the said Rae Brooks as to the model or year in which said automobiles were manufactured. That said Rae Brooks then informed affiant that he was not sure of the time when said automobiles were manufactured but stated to affiant that he had bills of sale for said automobiles which he had secured from the persons from whom he had purchased the same in his office on the first floor of said Brooks building which bills of sale gave certain numbers, being factory or serial numbers of said automobiles and that by the aid of such numbers they would communicate with the Knapp Brown Company, the managers of which were then agents for the Nash automobiles, and ascertain definitely the model or year when said automobiles were manufactured. That thereupon the said Rae Brooks and affiant proceeded to the office on the first floor of said building and the said Rae Brooks produced from files which he had in said office, two bills of sale, each referring to Nash automobiles, being the automobiles on the upper floor of said building which had just been examined by affiant.

Affiant further states that he personally saw and examined such bills of sale; that each was on a regular printed form such as is ordinarily used in the sale of personal property; that affiant does not distinctly remember the contents of said bills of sale except he distinctly recalls that each referred to Nash automobiles, and the numbers therein mentioned corresponded to the numbers on the automobiles examined as hereinabove referred to; and that such bills of sale were in the possession of said Rae Brooks and were by him [fol. 40 & 41] placed back in the files from which they had been produced in affiant's presence in the office of said Rae Brooks.

Affiant further states that after said occasion and at no time previous to the trial or during the trial of the said Rae Brooks in the District Court of the United States for the District of South Dakota, Southern Division, during the October term thereof in the year 1923, did he inform any person of the occasion or the examination by him of the bills of sale herein referred to.

That had he known or believed that the matters herein referred

to were material to the defense of the said Rae Brooks in said case, he would gladly have testified thereto during said trial.

Dated at Sioux Falls, South Dakota, this 5th day of December, 1923.

Wilson Powers.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed December 10, 1923

Now comes the defendant, Rae Brooks and believing that error hath occurred upon the trial of this action respectfully asks this Court to grant him a new trial for the following reasons:

1. Newly discovered evidence of which the said defendant had no knowledge and could not with ordinary diligence have procured, as will more fully appear by the *affidant* of Wilson Powers, hereto attached and filed herewith.

2. In ruling and deciding that where a motor vehicle had been stolen and transported in Inter State Commerce, that a party who had innocently received the same before having knowledge that the same was stolen could be guilty under the National Motor Vehicle Theft Act of concealing, storing, selling or disposing of such vehicle, by reason of his subsequently being informed that such car was so stolen.

3. That the evidence in this case is not sufficient to show that Mr. Brooks had knowledge that the cars in question had been stolen at the time he purchased and moved the same from Iowa to South Dakota.

a. It does not appear from such evidence that even the in-[fol. 43] spectors or agents of the Government or State of Iowa had any such knowledge, either at that time or subsequently when interviewing Mr. Brooks in Sioux Falls or at Virgil.

b. The evidence shows Mr. Campbell was, while in Sioux Falls, attempting to ascertain if such cars had been stolen, but possessed no such knowledge.

c. That recent possession of stolen property may be evidence the possessor is the thief, but is not evidence against an alleged receiver of stolen property, that he had knowledge it was stolen.

d. That where a party in good faith receives by purchase or even gift, property, which he later has reason to believe has been stolen, he is not obliged to return same until the owner proves his title and such possessor's title is good against the world, except the real owner.

4. That if Mr. Brooks received the cars innocently the statements of Mr. Campbell and Mr. Sherwood, neither of whom at the time knew from whence or whom such cars had been stolen, nor that the same were stolen, but only suspected it on general principles, their statements to Mr. Brooks would be no higher than their own knowledge, a mere suspicion, not based on facts and he, Brooks, would not be required to act upon the same.

5. That where a party purchases such vehicle, even with guilty knowledge, and moves the same in Interstate Commerce, his subsequent retention, whether it be in driving, placing in garage or sell-
[fol. 44] ing, does not constitute a separate offense, Section 4 of such act relating of necessity only to third parties who have received the vehicle.

6. That the Court should have allowed the defendant to test the memory of Mr. Burke upon the several questions propounded to him.

7. The Court should have sustained the motion made by the defendant at the close of the case by the prosecution and advised the jury to then return a verdict of acquittal.

8. The Court erred in the following regards on evidence during the course of the trial:

a. In striking out from the testimony of Mr. Dwight his statement "At the time he (Brooks) said this, Mr. Campbell stood within four feet of us and could not but help to have overheard the conversation."

b. In allowing Mr. Dwight to be cross examined as to whether he had made statements that he had suffered large losses on account of his dealings with Mr. Brooks.

c. In overruing the defendant's objection and allowing the U. S. Attorney to interrogate Mr. Burke to the effect if he had not stated to him that he, Burke, was to get $50.00 to accompany Mr. Brooks to Sioux Falls and that the offer was such a large amount, made him, Burke, suspicious that the car had been stolen.

d. In allowing the U. S. Attorney, in the presence of the jury, to ask if Mr. Burke had not signed a statement to the effect that he suspected the cars were stolen, because Brooks had offered him $50.00 [fol. 45] to accompany him on such drive and in allowing such question to be repeated, asking if he, Burke, had not made similar statements to Mr. Sherwood and upon the witness answering, do you not so remember asking him if he would deny he made such statements.

e. In excluding the offer to use Mrs. Brooks as a witness in this case for the purpose of impeaching the Government's witnesses.

9. The U. S. Attorney committed prejudicial error to the rights of the defendant in asking Billie Burke with regard to statements and conversation to the effect that he, Burke, believed the cars in

question were stolen and that he, Burke, had stated he was to receive $50.00 for accompanying the same from Sioux City to Sioux Falls, a distance of less than one hundred miles.

10. The Court erred in not giving as instructions to the jury the requests made by the defendant.

11. In refusing to instruct the jury as requested by the defendant to the effect that if Brooks acquired the cars without guilty knowledge in Sioux City, having paid for the same and if they subsequently proved to be stolen cars, he would become the owner against every person in the world, except the real owner and therefore, would not be obliged to give the same to anybody, only the real owner. Further, if he purchased the cars in Sioux City without guilty knowledge and brought them to Sioux Falls without such knowledge, then the information subsequently imparted to him after he got to Sioux Falls by the agents of the Government or other sources, would not make them stolen cars, so as to make him liable for storing them subse-[fol. 46] quent to such time.

12. In charging the jury near the close of its instructions to the effect that the defendant might be guilty under the provisions of the statute, as to concealing and storing cars, even though he did not have information that they were so stolen when he took them at Sioux City and that under such condition he could be guilty under the second count.

13. The Court erred in overruling the defendant's demurrer to the indictment, but should have held that the Act of Congress, under which this prosecution is held, is in conflict with the rights reserved to the states and was not within the power of Congress to enact.

14. That there is no evidence that defendant is guilty.

Wherefore the defendant requests the Honorable Court that a new trial be granted herein.

Kirby, Kirby & Kirby, R. A. Bielska, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 47 & 48] In United States District Court

[Title omitted]

Order Denying Motion for New Trial—Filed Dec. 10, 1923

The Defendant having moved for a new trial for the reason set forth in said Motion and accompanying affidavit, and the Court after considering the same, deems it not well taken,

Now, therefore, it is ordered that said motion for a new trial be and the same is hereby denied by the Court.

Jas. D. Elliott, Judge.

Attest: Jerry Carleton, Clerk. (Seal of Court.)

To the foregoing Order the Defendant duly accepts and the said Execution is hereby settled.

Jas. D. Elliott, Judge.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Dec. 10, 1923

Now comes the defendant, Rae Brooks in this action and respectfully states and says that the trial court erred to his prejudice as follows:

1. In overruling the demurrer filed by the defendant to each count in the indictments for the reasons therein set forth and particularly that such indictments do not inform him of the nature and cause of the accusation against him as required by Article 6 of the Bill of Rights of the Federal Constitution and that the Act of Congress under which such indictment is found, namely, the National Motor Vehicle Theft Act, is not authorized under any of the powers conferred upon the National Government, but is an act by Congress to trench upon the police laws of the respective states.

2. In ruling and deciding that where a motor vehicle had been stolen and transported in Inter State Commerce, that a party who had innocently received the same before having knowledge that the same was stolen could be guilty under the National Motor Vehicle Theft Act of concealing, storing, selling or disposing of such vehicle, by reason of his subsequently being informed that such car was so stolen.

[fol. 50] 3. That the evidence in this case is not sufficient to show that Mr. Brooks had knowledge that the cars in question had been stolen at the time he purchased and moved the same from Iowa to South Dakota.

a. It does not appear from such evidence that even the inspectors or agents of the Government or State of Iowa had any such knowledge, either at that time or subsequently when interviewing Mr. Brooks in Sioux Falls or at Virgil.

b. The evidence shows Mr. Campbell was, while in Sioux Falls, attempting to ascertain if such cars had been stolen, but possessed no such knowledge.

c. That recent possession of stolen property may be evidence the possessor is the thief, but it is not evidence against an alleged receiver of stolen property, that he had knowledge it was stolen.

d. That where a party in good faith receives by purchase or even gift, property, which he later has reason to believe has been stolen, he is not obliged to return the same until the owner proves his title and such possessor's title is good against the world, except the real owner.

4. That if Mr. Brooks received the cars innocently the statements of Mr. Campbell and Mr. Sherwood, neither of whom at the time knew from whence or whom such cars had been stolen, nor that the same were stolen, but only suspected it on general principles, their statements to Mr. Brooks would be no higher than their own knowledge, a mere suspicion, not based on facts and he, Brooks, would not be required to act upon the same.

[fol. 51] 5. That where a party purchases such vehicle, even with guilty knowledge, and moves the same in interstate Commerce, his subsequent retention, whether it be in driving, placing in garage or selling, does not constitute a separate offense, Section 4 of such act relating to necessity only to third parties who have received the vehicle.

6. The Court should have sustained the motion made by the defendant at the close of the case by the prosecution and advised the jury to then return a verdict of acquittal.

7. The Court erred in the following regards on evidence during the course of the trial:

a. In striking out from the testimony of Mr. Dwight his statement "At the time he (Brooks) said this, Mr. Campbell stood within four feet of us and could not but help to have overheard the conversation."

b. In allowing Mr. Dwight to be cross examined as to whether he had made statements that he had suffered large losses on account of his dealings with Mr. Brooks.

c. In overruling the defendant's objection and allowing the U. S. Attorney to interrogate Mr. Burke to the effect if he had not stated to him that he, Burke, was to get $50.00 to accompany Mr. Brooks to Sioux Falls and that the offer was such a large amount, made him, Burke, suspicious that the car had been stolen.

d. In allowing the U. S. Attorney, in the presence of the jury, to ask if Mr. Burke *ahd* not signed a statement to the effect that he suspected the cars were stolen, because Brooks had offered him [fol. 52] $50.00 to accompany him on such drive and in allowing

such question to be repeated, asking if he, Burke, had not made similar statements to Mr. Sherwood and upon the witness answering, do you not so remember asking him if he would deny he made such statements.

e. In excluding the offer to use Mrs. Brooks as a witness in this case for the purpose of impeaching the Government's witnesses.

8. The U. S. Attorney committed prejudicial error to the rights of the defendant in asking Billie Burke with regard to statements and conversation to the effect that he, Burke, believed the cars in question were stolen and that he Burke, had stated he was to receive $50.00 for accompanying the same from Sioux City to Sioux Falls, a distance of less than one hundred miles.

9. The Court erred in not giving as instructions to the jury the requests made by the defendant.

10. In refusing to instruct the jury as requested by the defendant to the effect that if Brooks acquired the cars without guilty knowledge in Sioux City, having paid for the same and if they subsequently proved to be stolen cars, he would become the owner against every person in the world, except the real owner and therefore, would not be obliged to give the same to anybody, only the real owner. Further, if he purchased the cars in Sioux City without guilty knowledge and brought them to Sioux Falls without such knowledge, then the information subsequently imparted to him after [fols. 53 & 54] he got to Sioux Falls by the agents of the Government or other sources, would not make them stolen cars, so as to make him liable for storing them subsequent to such time.

11. In charging the jury near the close of its instructions to the effect that the defendant might be guilty under the provisions of the statute, as to concealing and storing cars, even though he did not have information that they were so stolen when he took them at Sioux City and that under such condition he could be guilty under the second count.

12. In denying the defendant's motion for new trial for all the reasons above set forth and because of newly discovered evidence presented in the affidavit of Wilson Powers.

13. Overruling motion in arrest of judgment.

Prayer for Reversal

Now comes the defendant, Rae Brooks, and respectfully asks the Honorable Supreme Court of the United States, to reverse the action of the trial court for the reasons set forth in the above Assignment of Errors.

Kirby, Kirby & Kirby, R. A. Bielski, Attys. for Deft.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF EXCEPTIONS—Filed Jan. 10, 1924

Two indictments of two counts each were returned by the grand jury against this defendant and by the Court ordered consolidated for the purpose of trial. The defendant upon being arraigned demurred to each count in each indictment, which demurrer and all parts thereof having been overruled, the defendant excepted.

Thereupon the defendant entered a plea of not guilty. On October 25, 1923 a jury having been regularly impanelled and charged with this case, the following proceedings were had.

The Government introduced evidence:

That on September 7, 1921 there was stolen from W. C. Wendt at Omaha, Nebraska a seven passenger Nash Touring car of the value of Twelve Hundred Dollars, then used by Mr. Wendt as a taxi in said city. Also that on November 6, 1921, at St. Joe, Missouri, there was stolen from A. E. Traxler a 1919 five passenger Nash Automobile worth Eight Hundred Dollars and that on January 8, 1922 Mr. Brooks was the owner of a large four story garage building at the corner of Tenth Street and Dakota Avenue, one of the prominent parts of said city and said cars were each found in his possession, stored in such garage, and that he had shortly before that date, transported such cars from Sioux City, Iowa to Sioux Falls, South Dakota.

W. S. CAMPBELL an investigator of stolen cars for the State of Iowa testified: That he knew Mr. Brooks was a merchant in Sioux Falls, South Dakota, having met him in his garage at Sioux Falls on January 2, 1922.

[fol. 56] I saw Rae Brooks in Sioux City, Iowa, on January 7, 1922, down near the stock yards in front of Heine Fowler's soft drink parlor, about nine o'clock in the evening. Ray Brooks, Billy Burke and a man I did not know came out of Heine Fowler's soft drink parlor and got into a five passenger Nash car and drove down to what is called the Stock Yards, and I followed them as far as the stock yards garage at Sioux City. Guy Andrews of Sioux City was with me. At that time my business was tracing stolen automobiles. Guy Andrews is now sick in the Samaritan Hospital at Sioux City.

This Nash car was yellow wheeled and there was one other car beside it there. I don't know what it was. Guy Andrews and I drove to Sioux Falls that night and arrived there early that morning.

On January 8, 1922, just before the noon hour, Guy Andrews and I went to the Brooks Garage in Sioux Falls but did not see Mr. Brooks. I went upstairs into the paint room. Some men were painting in there. I think this was on the third floor. I examined the license number on the five passenger Nash car and found it was the

same one I saw on the Nash car in front of Heine Fowler's soft drink parlor on January 7th.

On Monday forenoon, January 9th, I again visited the Brooks Gagage. The cars were on the third floor. I observed that the last number of the motor number on the five passenger Nash was changed from a 3 to 8. Mr. Pickett was with me. That on Monday January 9, 1922, just before noon in company with the chief of Detectives of the City of Sioux Falls, Mr. Pickett, we had a talk with Mr. Brooks in his garage. We told him the numbers on these cars had been defaced and thought they were both stolen. Mr. Brooks said he had purchased the car from a man in Sioux City on January 7th named George Parker. He said, as I remember, he gave three Hundred Dollars for two cars and some interest in Michigan land or Michigan property. Right after dinner myself and Pickett went back to the Brooks' Garage and just as we got to the door, this five passenger Nash was driven out. We went up into the garage where Mr. Brooks was with the seven passenger Nash, pushing it out of a stall and toward the elevator. I asked Mr. Brooks who drove out the Nash car just as we came up. He said a man named Billie Burke drove it down to the Virginia Cafe. Mr. Brooks [fol. 57] took a Buick Coupe and drove Mr. Pickett and myself down past the Virginia Cafe. Nobody was there, finally he drove us out to a man's house by the name of Fred Ball and there in Fred Ball's private garage was this five passenger Nash. I asked Mr. Brooks what Mr. Ball was doing with the car and he said he wanted to drive it to Rock Rapids, Iowa. I got in this Nash car and drove it down to the Walkin's garage in this city and placed it in storage. Brooks did not object. I did not, at the time, know for sure it was a stolen car. Mr. Brooks then gave me a storage ticket for the Wendt seven passenger car and I told him to hold the car until we made further investigation. I removed the distributor button. I saw this latter car again in the Brooks' Garage about July 11th or 13th. I came up to Sioux Falls on January 17, went to the Walkin's Garage with Mr. Traxler. I had no conversation with Mr. Brooks. Mr. Traxler then got his car.

On cross examination Mr. Campbell testified: I saw Mr. Brooks with a party named Burke and another party I later learned was Parker in one of those cars at Sioux City on January 7th. I did not know myself that it was a stolen car. On Sunday January 8, I went up alone to the Brooks' Garage. It was open. I found these two cars there and took their numbers. I did not go down there at night with Mr. Pickett and remove the locks and take the numbers. Mr. Pickett was not with me at the garage on Sunday at all. The first conversation I had with Mr. Brooks when Pickett was present was up-stairs in the garage at about two o'clock Monday afternoon. The next conversation was a little later when we picked up Billie Burke and another after we got the Nash car back. These are all the conversations that myself, Pickett and Brooks had relative to these matters. At the second conversation between Mr. Pickett, Brooks and myself Mr. Dwight was present. I asked Mr. Brooks if he had a

bill of sale of the cars. He said the only thing he had was his check. He did not give me a bill of sale and I did not take it away with me. The first time I noticed that the numbers on this car had been changed from a figure three to a figure eight was when Mr. Pickett and I were up there in the forenoon. That was the time I first inspected the numbers and took them off. Exhibit "A" is a telegram I wrote and sent to a bureau in Chicago that keeps a record [fol. 58] of missing cars. In that telegram I described the car as #61218 and not 61213. In that conversation where Mr. Dwight was present I would not say whether or not he asked Mr. Brooks if he had a bill of sale for these cars, I did not hear him ask Mr. Brooks, let me see or where are the bills of sale. Mr. Brooks did not say to Mr. Dwight at that time that I had the bills of sale. I recollect asking Mr.Brooks when Pickett was present if he had a bill of sale. I would not say that when I informed Mr. Brooks these cars had been stolen he said "I am glad to learn it now before they are disposed of." It is pretty hard to remember every little detail. In this telegram, Exhibit "A," the only motor number I gave was the one I stated, but I gave them other numbers of different parts taken from the same car.

H. D. Fowler, called by the prosecution, testified: In January 1922 I was proprietor of a lunch room and soft drink parlor in Sioux City. Was then acquainted with the defendant, Rae Brooks. I believe I saw him on January 7th in my place and ca*h*ed a check for him for One Hundred Dollars. One George Parker was with him, also I think Billie Burke. He said he was buying a second hand automobile.

Cross-examination:

I had known George Parker for about a year. He used to get lunch, tobacco, etc. at my place. I saw his wife a few times and knew where he lived. Mr. Brooks and Mr. Parker were talking about buying a car that day. I heard some of the conversation. Mr. Parker told him about a car some woman had and Mr. Brooks called up some woman on the phone. I saw Mr. Brooks write out some bills of sale at the counter there. "I did not read these writings or papers which Brooks wrote out in my place and which I called bills of sale. I heard them talking about bills of sale. That is all I know about that." Do not remember whether I witnessed it or not. I heard Mr. Parker say that this one car this woman had and then he says, I think I can get you another one. It was along about noon when they negotiated for the first car, as I came to work at eleven o'clock. Mr. Parker's business at that time was dickering around in automobiles. In the course of their conversation, I heard them talking about bonds. I did not read the bills of sale which Mr. Brooks wrote out, but I heard them talking about bills of sale, I don't recall Mr. Brooks [fol. 59] writing out two or three other checks and giving them to Parker in payment of one of the other of these cars.

WILLIAM E. BURKE, witness for the prosecution testified: I am called Billie Burke and am now in the penitentiary at Fort Madison, Iowa. I know Mr. Brooks and saw him at Sioux City on or about Saturday, January 7, 1922. I don't remember the date, but I came that night to Sioux Falls with Mr. Rae Brooks in a Nash Seven Passenger, pretty well wornout car. Arrived in Sioux Falls about 3:30 o'clock in the morning. Another Nash car was driven by one they called George, with the one I was riding in. We drove the cars into the Brooks building and Mr. Brooks took them up on the elevator. On the way up from Sioux City I asked Mr. Brooks, are you sure that the cars are not stolen? He answered me he was pretty sure they were not. Even if they are, I don't think there will be much trouble. I believe they are not.

On cross examination the witness, Burke, testified: One car was driven by George. I don't know whether his last name was Parker or not. I am positive that Mr. Brooks and I left in a car from Sioux City, but we stick in the snow, so we might have changed. I believe it is a fact that Mr. Brooks was ahead of myself and George all the way until we got to Beresford, South Dakota and then we caught up with Mr. Brooks. I left Sioux City in Mr. Brooks' car. We got stuck in the snow. I think I changed to George's car.

A. P. SHERWOOD, a witness for the Government testified that he was a special agent for the Department of Justice and in the latter part of May, 1922, on Main Street in the Town of Virgil, South Dakota he saw the defendant, Mr. Brooks, in possession of this seven passenger Nash touring car, which had been stolen from Mr. Wendt. It was an old car and in bad shape. That in response to a question, Mr. Brooks said it was — car Campbell had tied up in Sioux Falls and that he, Brooks, got it through C. M. Wykoff of Sioux City. That he, Brooks, had gone to Sioux City for some second hand cars; that Mr. Wykoff had some cars but they did not suit him and Mr. Wykoff then told him that he knew of two cars he could buy, one in the hands of an employee of the Daly [fol. 60] Motor Company and the other in the hands of Mr. Foster. Mr. Brooks further stated that he would come to Sioux City at any time we could agree upon a date and he would prove to me as a representative of the Government, that he had secured these cars through Mr. Wykoff in a lawful manner. It was arranged as soon as he got his crops in that we should meet in Sioux City. I cannot give any definite date that was set. Not to my knowledge did Mr. Brooks ever come to Sioux City and see me. Witness continues: This car was marked in many places with the letter "W" by a stencil and these were pointed out there between myself, Mr. Smith and Mr. Brooks. I practically knew at that time who claimed to be owner of the car. I think I told Mr. Brooks that the car was a stolen car and I thought the owner was an Omaha man. I told him the car should not be disposed of until the matter had been thoroughly thrashed out as to the rightful owner. He said he

would keep it in his custody. The numbers had been partly obliterated and I think I called his attention to this fact.

On cross examination witness testified: Mrs. Brooks and two children were present when I examined the car. They were close enough to hear the conversation. I don't think they were in the car at the time. I think they had gone into the store at the time. Myself and Mr. Smith were not intoxicated at this time and there was no smell of liquor from my clothes. I did not say I had no evidence that the car was stolen. I had no legal right to tell him not to dispose of the car. Mr. Brooks complained that the car had a bent shaft, but I did not tell him he could trade it off as far as I was concerned.

A. C. TILGNER, witness for the Government testified: That he run a garage in the 1922 in Aberdeen and in June of that year traded the defendant a Buick car for this Nash seven passenger car. Later, about the middle of July, Mr. Brooks and one Mr. Woolridge, an adjuster of the St. Paul Fire & Marine Insurance Company, came to my place. Mr. Brooks called me out from under the car where I was at work and said this man claims that car is stolen. Mr. Woolridge showed me a loss claim report from the Insurance Company, giving the numbers and the like. While doing this, Mr. Brooks said, [fol. 61] this isn't a stolen car, this is a frame up. I saw some stencil W's on the car. I asked Mr. Brooks for my car and he wouldn't give it up, so I got out papers for the Sheriff and Mr. Woolridge took this Nash car. The Nash car was worth $600.00 or $700.00. On this day his wife and family were in town. He took the Buick and drove home and then drove back. Just when he drove back to give me the car, the sheriff was there and I was getting out a replevin. That ended the proceedings.

J. C. WOOLRIDGE, a witness for the Government, testified: That he was insurance adjuster for several companies. Was out to Mr. Brooks' farm near Virgil in July, 1922. Told Mr. Brooks that he had been sent after this seven passenger Nash car by the insurance company. Brooks said he was not the owner of it any longer. Asked him where it was and he said that didn't matter. "I went back to the town of Virgil. I saw Mr. Brooks the second time about two o'clock in the afternoon. While in Virgil I made some inquiries as to where the Nash car that had bee- in Brooks' possession was. When I went back to Brooks' place the second time on that day I told him that I had been informed that he had traded for a car at the Nash garage, for a little Buick that he had in his possession, and I suggested that we go and make the trade back in as much as this was reported as a stolen car. I knew nothing of it being stolen. He agreed to go with me to Aberdeen and did go with me and exchanged cars back and turned over the Nash car to me." I told him that I had been in-

formed that it had been traded for a Buick Six at the Nash Garage and suggested that we go and make the trade back as it was reported to be a stolen car. He agreed to go to Aberdeen and exchange cars back and turn over the Nash car to me. At Aberdeen we found this seven passenger Nash, stenciled with the letter "W" in several places, with name W. C. Wendt on inner tube. These were the only identification marks I had to go by. Mr. Brooks went over the car very carefully to determine whether or not it was the car we were looking for. I took the car to Sioux City. "When I was in the garage of the Brooks' farm near Virgil on that day I saw a tire setting in the garage with a "W" burned in the rubber. I last saw that Nash car at the McDonald Garage or storage warehouse in Sioux City [fol. 62] day before yesterday. Mr. Wendt and Mr. Hurley were with me."

C. M. Wykoff testified: That he was manager of the Wykoff Auto Supply Company at Sioux City and that he was not acquainted with the defendant, Mr. Brooks and had never had any conversation with him about January 6, 1922. That he had fifty four people working for him in January, 1922, a large part of whom were salesmen, in different occupations around his building, handling and selling cars. That his son was with him in business and his name was A. P. Wykoff; that he had never sold a Nash car to Mr. Brooks and had never directed the defendant Brooks to purchase such car from some other party.

The foregoing constitutes all the evidence introduced by the prosecution. Thereupon the prosecution rested. The defendant, upon the close of the evidence by the prosecution, moved the Court as follows:

Defendant's Motion for Verdict and Order Overruling Same

1. At this time the defendant requests the Court to decide and so instruct the jury that the Government has not established any facts sufficient to submit to them any question in this case and that they cannot, under the evidence, do anything but return a verdict of not guilty.

a. Because there is no evidence in this case that reasonably shows or tends to show tnat Mr. Brooks had any knowledge that those cars, at the time he received them, were stolen property.

b. There is no evidence that would justify submitting to the jury that Mr. Brooks under the statute had knowledge that such cars were stolen, at the time he is charged with transporting them from Sioux City to Sioux Falls.

The Court: The motion is denied, with an exception to the defendant. I am of the opinion that there is enough here to go to the jury.

DEFENDANT'S EVIDENCE

T. W. DWIGHT, a witness for the defendant, testified: That he was a member of the Board of Regents, having charge of the educational institutions of the State and that the defendant is his son in law; that he had met the witness, W. S. Campbell, that he was passing the Brooks' Garage on Monday afternoon about two o'clock when Mr. [fol. 63] Brooks called him into the office, which was on the street floor. Mr. Brooks introduced him to Mr. Campbell and said, this man says that the cars I brought from Sioux City were stolen cars. Witness said if so, tell him absolutely everything you know about it. Who did you buy the cars of? Mr. Brooks told me and I said, did you get a bill of sale? He said yes. I said, where is that bill of sale? He said, I gave it to Mr. Campbell. This was in an ordinary conversational tone. At the time he said this Mr. Campbell stood within four feet of us and could not but help to have overheard the conversation.

United States Attorney: "I move the last sentence be stricken out, it is not responsive.

The Court: It may be stricken out.

Q. What did Mr. Campbell say in response to you?

A. Nothing.

On cross-examination Mr. Dwight testified: At this conversation Mr. Brooks said he bought the cars from Parker. Mr. Brooks also said when I inquired with regard to bills of sale that he had given them to Campbell. I did not see any bills of sale given to Campbell. I did not see any bills of sale there. Campbell said nothing in reply.

By U. S. Attorney:

Q. Did you at that time say to Mr. Campbell in substance that this man, referring to Brooks had practically broken you and cost you about $60,000.00 or $70,000.00, or words to that effect.

Defendant objects as incompetent, irrelevant, immaterial. Cannot be made the basis of impeachment.

The Court: Overruled.

Defendant excepts.

A. I don't recollect that I did.

Q. Did you tell him at that time that Brooks had cost you a large sum of money?

A. I may have.

P. S. PICKETT, witness for the defendant, testified: I am the Mr. Pickett that has been mentioned as a member of the police force of the City of Sioux Falls, having been on the force about eight years and before that was special agent for the Rock Island Railroad protecting their property. Am acquainted with Mr. Campbell, who has

testified. Mr. Campbell called upon me at the police station Saturday night. I was in front of the Brooks' Garage on Sunday when Mr. Campbell went in there. "About midnight Sunday night Mr. Campbell and I went up to the third floor of the Brooks garage and examined the numbers on these two Nash cars with a flash light. [fol. 64] Campbell read the numbers and I took them down." I also was with Mr. Campbell at the Brooks' Garage on Monday forenoon. Mr. Campbell and myself met Mr. Brooks at the Brooks' Garage on Monday between ten and eleven o'clock in the forenoon. We talked about the car. The supposition was they were stolen. Brooks said he bought them at Sioux City and paid for them in various ways, checks, money, bonds or something. Brooks was asked if he had any bill of sale for the two cars in question. He answered that he had. We asked him where it was at and he answered down stairs, in the office. We then went down stairs to the main floor of the building where the desk was. Mr. Brooks had some papers. He represented to me that they were the bills of sale for these two cars. Campbell was there in my presence. I don't know what became of the bills of sale or the papers he represented to be the bills of sale, because I didn't read them. These papers were placed where all of us could see them. We were all there together, probably three or five feet apart. We were interrupted at that time by Mr. Burke coming in. Mr. Campbell wished him (Burke) arrested for having stolen property in his possession, that was his directions to me, so I took him over to the police station. Before the arrest of Burke, Campbell and Mr. Brooks and myself went down to the restaurant to see if we could find Burke and then came up to the building afterwards. This was about dinner time I expect. We came back to the garage about one o'clock, and saw a Nash car going out. I learned later it was Mr. Ball that was driving it. We went in and asked Mr. Brooks why he had moved those cars, if he was trying to get rid of one of them, and he said no, he was not. A few more questions and he told — he had agreed to lend the car to Mr. Ball in the morning before we had our first talk with him, and if Mr. Ball took one of the cars it was unbeknown to him. Mr. Campbell said if you know where it is, we will take a car and get it. Mr. Campbell and Mr. Brooks went after it, I did not. At the time this car was taken away, to the best of my recollection there was nothing said by Mr. Brooks to the effect that it had been taken away by Burke, and that they would go down to the restaurant and chase him up, because Mr. Burke was in jail at that time.

[fol. 65] On cross-examination Mr. Pickett testified; I resigned from the Police Force in December. They wanted me to stay another month and I stayed until the last of January. Have not been directly connected with it since. At Mr. Campbell's request on the 7, 8 and 9 of January, I went with him. The only times I went with him being on Sunday and Monday. Sunday in the afternoon right after dinner, and Sunday night along about twelve o'clock, and again Monday. At this time on Monday Mr. Brooks was present and Mr. Campbell was with me. We met Brooks on the third floor of the

building and had a conversation with him with reference to those cars. He said he drove one in." It was Monday forenoon when we talked about the bills of sale. It was on white looking paper to me. I did not see them. They were folded up and lay on some books on the desk. He said, I got the bills of sale here and here are the books, you can look over my books. Just then was when Mr. Burke came in. These bills of sale he got them out of his desk. Of my own knowledge, I can't swear they were bills of sale, or who signed them, or whether they were printed or written. He had them in his hand when Mr. Burke came in, and I went and got Burke, and that was the last I saw or heard of the bills of sale. The last I saw of what he represented as the bills of sale, Campbell was right there with them. The arrest was made at one P. M. as there had been quite a little time consumed, an hour and a half or maybe longer. When the car was brought out was after we had been up to the police station with Burke and come back. Campbell went with me to the police station. At that time Mr. Brooks was in the office down stairs.

Q. Mr. Pickett, at any time you went in there with Campbell was Brooks in the act of putting the other of those Nash cars into the elevator?

A. I won't say, he was in the act, he pushed it out from the stall where it was. It didn't get into the elevator. It was on the floor near the elevator. I didn't see him pushing the car. The car was standing still but it had been moved. He, Brooks, was on this floor. I have a recollection of some conversation about making room for another car. I didn't see Billie Burke at the Brooks' Garage except when I arrested him. There is probably fifteen or twenty cars up [fol. 66] stairs. There was not many vacant spaces. I am not positive. I think it was the the police car that Brooks and Campbell went in to look after the car that Ball had taken out, I am not positive. Campbell and Brooks went to the Virginia Cafe before Burke was arrested to see if they could run across him, but they came back and said they hadn't. I have done some work in this case for Mr. Kirby since severing my connection with the police force. I went down to Fort Madison Penitentiary with defendant's counsel to interview Billie Burke. There are three floors in the Brooks Garage. These cars were on the third floor. A paint room is on the second floor.

William E. Burke, witness for the defendant testified: I met Mr. Brooks in Sioux City, the day prior to the bringing of the cars to Sioux Falls. I think it was Friday. I asked him what he was doing and he said he had come to Sioux City to see if he could buy a couple of Ford sedans second-handed, as he was going out on a farm and he could trade them for stock. We went around to a few garages, but he did not buy anything. Next day we went to practically all of them, to the West Garage, from there to the one that sells Chandlers. These are garages that use second handed cars. We

went over to Wykoff's place. The first person I saw when we entered I knew well was Art Wykoff, the son of the gentleman who testified yesterday. Mr. Brooks talked with young Wykoff. I introduced them. Brooks asked if they had any cars to sell, especially Ford sedans. Mr. Wykoff said no, he had quite a few big cars. While we were talking there were four or five other persons present maybe ten or fifteen feet off. Then Mr. Brooks and I went out toward Fourth Street. There was a young man named George who had been in the garage when Wykoff and Brooks were talking, who introduced himself and said, I understand you are looking for second hand cars. This is the same man referred to as George Parker. Mr. Parker said, I have a car to sell, which I believe you can buy pretty reasonable. It is a seven passenger Nash. I don't own the car, but I know some lady, she has been hard up and wants to sell the car. Brooks said, where can I see this lady and he says, I don't know if you can see [fol. 67] her, but you can call her up over the telephone. If you want to see the car first we can go around and look at it. It is around the stock yards. Brooks said he had some occasion to go to the Stock Yard Exchange, so we all went down there and got off the street car in front of Hanson & Fowler's Restaurant. We went in there. This man George took the telephone book and finally gave a number. Brooks called up the party, but I was not close enough to hear him when he was talking. I heard some of the conversation. They were talking about the car that Parker wanted to sell to Brooks. Then George and Brooks went out. I did not go. After a couple of hours or so they came back. Then Brooks asked Fowler to give him a check. I have a deal to close in buying a car. Mr. Brooks wrote out a check for $100.00 and Fowler handed the check to the porter and he went out and got the money. Mr. Brooks had some papers in his pocket and he pulled them out and laid them on a cigar case. He was writing and he talked about some bonds and said, I will give you so much and a bond. I could not see what size. It was a greenish or grey colored paper Mr. Brooks gave Mr. Parker. I know he gave him a bond and some checks and some money. George was near the stove. Brooks said to him, come over here I want you to sign something and he went over to the show case. I saw Mr. Brooks writing something on these papers. I believe they called over Mr. Fowler to write on it. He, Brooks, called Mr. Fowler to one side and said I want you to tell me the truth. Mr. Fowler said I know this man quite well, I believe he is all right. He was referring to George Parker. After that Mr. Brooks left the place with Mr. Parker and another man and came back about 7 or 7.30. Mr. Brooks then said to me, I want you to go back to Sioux Falls, we may get stuck somewhere and we have two cars. So I went along and we took the two cars to Sioux Falls and got there about 3 o'clock in the morning putting them on second or third floor of Brooks Building. I did not see Mr. Brooks after that until one day about twelve o'clock, possibly a little after. The time I was arrested I was going to see Mr. Brooks to collect my pay for coming to Sioux Falls.

Cross-examination of Billie Burke:

I have known Mr. Brooks about two and a half years. I have been [fol. 68] around his repair shop a good deal and spent a good deal of my time in Brooks' garage prior to going to Sioux City. Friday we were around together, had our meals together stayed at the same hotel, slept in the same room and the next day the same. I know Art Wyckoff for two and a half years, do not know his father. On March 21st last, at Ft. Madison penitentiary I said to Pat Sherwood that while at the Wyckoff garage I talked to a man whom I took to be Charlie Wyckoff. At that time I said I had talked to Art Wyckoff. I don't exactly remember whether I saw Charie Wyckoff then, but there was one whom I took for Mr. Wyckoff. Mr. Brooks talked to the man whom I took for Charlie Wyckoff, I did not. Since I was arrested up here I have been confined all the time. "I had been in Sioux City prior to the time I was at the Wykoff Garage with Brooks about 14 or 15 months. I had no particular business in Sioux City. I was waiting trial and was under $5,000.00 bond. On the second day when we were at the Wykoff Garage in Sioux City, around ten-thirty or eleven o'clock, this man George introduced himself to Mr. Brooks. We were in the show room and went out of the show room, when he met us in front of the store." "I had never seen this man before." "He was about six feet tall, light complected, skinny fellow. I do not remember what kind of clothes he wore. I am pretty sure that I observed him in the Wykoff Garage before he came up and talked to Mr. Brooks. He stepped right up to Mr. Brooks and said, 'Beg pardon, my name is so and so. I didn't catch what he said. I understand you looking for second hand cars.' Mr. Brooks say, 'I was, it don't seem to me I can find one to suit me.' He say, 'I have a car for sale that you can buy for pretty reasonable price. The car don't belong to me, but it belongs to some lady. I have authority to sell it. If you want to see the car I can show it to you. It has been stored in the garage for months.' That is practically all that was said. I didn't pay very much attention. I don't believe I heard Brooks ask him the price of the car. George told Brooks the car was a Nash, seven passenger. The three of us then took the street car and went down to Fowler's soft drink parlor in the stock yards dis-[fol. 69] trict. Brooks and George had a conversation on the street car while we were riding down. The seats were sideways in the street car and Brooks was sitting next to George. I was sitting across on the other side. Brooks began talking about price. George said, 'I believe you can buy for reasonable price. You can make good trade on it.' He didn't give him the actual price. He said, 'You can call the lady over the telephone.' I believe I heard George tell Brooks the lady's name but I can't remember. He gave Brooks her telephone number. I don't know the name of the lady.

"The first time I saw Brooks in possession of a car was about seven o'clock that evening. It was getting dark. The car was right in front of Heine Fowler's place. I did not see them drive the car in. I saw Brooks, George and another fellow getting out of the car. I don't know who the third man was. This was the five passenger car."

"The three of us had supper at Heine Fowler's. Brooks wanted me to go to Sioux Falls with him. He told me he had two cars. I said, 'It is too cold. I don't feel right, I don't believe I will go.' Brooks said, 'We will put the curtains on and it will be warm enough. You don't have to drive. You can go with me. George is going to drive a car.' Brooks said, 'Come on, you won't freeze, and tomorrow we will come back together.' So I got ready and we got into the car and drove to the stock yards garage."

Q. Did he, Mr. Brooks, or did he not in that conversation when he asked you to come up here tell you he would give you $50.00?

A. I don't exactly remember the proposition. He promised to pay me. I did not say it. I don't remember what he said the amount was. I know the amount was worth it to me. I remember having a conversation in your office on this matter day before yesterday.

By U. S. Attorney:

Don't you recall saying to me and to Mr. Barron and Mr. Clark and to the men in whose charge you are now, that Mr. Brooks at that time told you he would give you $50.00 if you would drive up with him, and the fact that he offered to pay you so much made you suspicious it was a stolen car?

By Defendant's Attorney: That is objected to as incompetent and improper cross-examination, immaterial and irrelevant, hearsay to any of the issues in the case, not a matter upon which impeachment [fol. 70] of this man whom they put upon the stand could be predicated. Secondarily, I desire to except to such a statement made by counsel in the presence of the jury as a matter prejudicial to the defendant.

The court: Objection overruled.

Defendant excepts.

The Court: This witness is not their own witness now. The defendant has made him his witness. And this is proper cross examination insofar as the amount that he agreed to pay him, because it is a part of his direct testimony that he was to be paid.

A. If I answer that question I would say this, that I did not say myself it was fifty dollars. I said I didn't know how much was offered.

Q. Did you or did you not make that statement?

A. I did not make the fifty dollar statement.

Q. Answer the question.

A. No. I signed Exhibit "2" after reading it.

By U. S. Attorney:

Q. I call your attention to that part of this Exhibit in which you say that he stated to me he was buying the car so he could afford to pay me $50.00 to accompany him on this drive, that Brooks did not tell me——

At this point defendant's attorney interrupted such witness and objected to this procedure as trying to use something before the jury not in evidence. Leading and suggestive.

The Court: The question is proper in form, and he may answer.

Defendant excepts.

Counsel for U. S. (continuing): These cars were stolen. That his offer to pay me $50.00 for the drive convinced me that they were stolen. Did you know when you signed this Exhibit that that statement was contained therein?

Defendant objects, and objection sustained.

By U. S. Attorney:

Q. Did you on or about the 21st day of March, 1923, at Ft. Madison Penitentiary say to Pat Sherwood, that in the conversation had with Mr. Brooks in Sioux City on or about the 8th day of January, 1922, he offered you $50.00 to accompany him with these cars from Sioux City to Sioux Falls?

Defendant objects as hearsay so far as Brooks is concerned.

The Court: Objection overruled.

Defendant excepts.

A. I don't remember.

Q. Do you deny that you made that statement to Pat Sherwood?

The same objection as interposed by the defendant's attorney as to the last question and answer, which is overruled by the Court and exception taken by defendant.

A. I do not deny I made the statement.

Q. Did you not at the same place and at the same time say to [fol. 71] Pat Sherwood, that Brooks did not tell you these cars were stolen, but that his offer to pay you $50.00 for the drive convinced you that they were?

To the foregoing the defendant objects. Already ruled upon by the Court, incompetent, hearsay so far as the defendant is concerned, calling for a conclusion of the witness, and specifically excepts to the acts of the prosecuting attorney in asking such questions, as prejudicial to the case of the defendant, and further ask the Court to advise the jury that such statements are improper and must be disregarded.

The Court: Sustained. Gentlemen of the jury, such a statement — not proper evidence and you shall disregard it.

Q. Did you or did you not say to Pat Sherwood at this time that the defendant Brooks offered to pay you $50.00 for assisting in driving these cars from Sioux City to Sioux Falls, having reference now to the Nash cars?

A. I did not mention the amount. I made the statement not including the amount.

Q. What did Mr. Brooks say to you on that evening to induce you to go to Sioux Falls?

A. He said he would pay me. I might make a few dollars. I don't remember if I asked him how much he would pay me. He said he would pay me when we got to Sioux Falls. That is why I was waiting for him that afternoon.

Mrs. Rae Brooks, wife of the defendant, called as a witness by the defendant. The prosecution objects, because the wife cannot testify for or against her husband.

Defendant's Counsel: We are calling her for the purpose of impeaching the testimony of two of the witnesses the government has called. We offer, by this testimony, to dispute and impeach.

At this point of the defendant attorney's statement, the Court interrupted saying, it doesn't make any different- what you offer it for, the witness is incompetent, to which ruling defendant excepts.

Rae Brooks, defendant, testified: I am 31 years of age. Graduate of the State University. Family consists of wife and three children. Have lived in Sioux Falls about eight years and been engaged in the tire and garage business most of the time. Erected the building known as the Brooks Garage, a three story, fire proof building and basement, 100 x 110 feet. Building erected for rent-
[fol. 72] ing purposes and divided into three show romms on the main floor. Upper floors are also divided, while the basement is for repair shop and storage. The paint shop is on the second floor. I was not running that. It was run by a firm named Hoyt and Steneger. I was using the north half of the third floor for storing cars. In January, 1922, I was handling tires and second hand cars mostly. Have always dealt in them more or less. My purpose in going to Sioux City in January, 1922, was I had an opportunity to trade a couple of Ford sedans for some cattle to stock a farm with. Could not get what I wanted here, so went to Sioux City. On arriving by railway in Sioux City, I went to a couple of Ford garages. I went to several other garages and met on the street a man named Burke, who has testified here. He had been in my garage several times. He said he wasn't doing anything, he would just as soon go with me.

Along toward noon I went into the Wyckoff Garage. They tried to sell me a couple of practically new Buicks, but there was nothing I wanted. Mr. Burke was with me. I talked to the salesman in the Wyckoff Garage. Don't recall just who it was but believe it was young Wyckoff and another salesman. When we left the Wyckoff Garage a man came up and introduced himself as George Parker. Said, you are looking for second hand cars. I have a good second hand car I would like to sell reasonable. I have not seen Mr. Parker

since and don't know of his whereabouts. He drove one of the cars I later purchased, to Sioux Falls. He stated the car was stored near the stockyards and as I had to go out there anyway he suggested we meet at the lunch counter of Fowler and Hanson. I went there and found I had known Mr. Fowler in Sioux Falls previously. I asked him about this man Parker and he said he is all right, he had been dealing in cars around there for a year or more. I met Mr. Parker there somewhere around three o'clock. I would not swear to the time and he and I went over to look at a Nash car. I am not acquainted with Sioux City. The car was in a private garage not far from the bridge. A story and a half house with a garage back of it. Mr. Parker tried to start the car and couldn't. I told him I had an appointment with somebody and would see him again in the morning. I went out there again in the morning and went over [fol. 73] and looked at this car and I believe this time Mr. Burke was along.

I believe it was about nine or ten o'clock, but may be off on the time, because it is practically two years since then. At that time I saw the lady who lived in the house. I asked her how long the car had been stored there and she said she believed six or seven months. I asked her if she knew Mr. Parker. She said he had rented this garage for a long time from her. I do not know the city description of these premises, but I made a note of the description on the bill of sale, I later received. Put down the street address and where the car was stored. The car would not start. Mr. Parker went and got a garage man, who started it. There was a little snow on the ground. We then went back to Mr. Fowler's place and closed the deal for this car. Mr. Parker told me this car belonged to a woman whose husband had been killed in a railroad accident in the spring, that he had done considerable mechanical work for them and loaned them some money and the car had been turned over to him for him to sell it. He gave me this lady's telephone number and prior to the purchase of the car I talked with her over the phone. She told me Mr. Parker had authority to sell the car and the bill of sale might run from him. I never met her and do not know her present whereabouts. I put the telephone number on the bill of sale I gave to Mr. Campbell, with her name. That was the bill of sale given by Mr. Parker in the purchase of this car. I gave Mr. Parker for this car $300.00 cash and a bond I had of $1,000.00. The afternoon before we had talked over the bond and told him if we dealt on the car he would have to take such bond. About two weeks before this time, I traded off my building to a man named Hamilton in Minneapolis and taken in about $37,000.00 worth of these bonds of the Upper Michigan Land Company. They were secured by land in upper Michigan. I had made investigation to ascertain the reasonable value of these bonds in St. Paul and figured they were worth 50 or 60¢ on the dollar. At the time I closed this deal I drew up a bill of sale, in Mr. Fowler's restaurant. Mr. Parker and myself signed it and I think Mr. Fowler signed it as a witness, but would not swear to it. I kept one and gave Mr. Parker the other, it being made in [fol. 74] duplicate. After this deal was closed Mr. Parker asked me

if I could use another car and I said I could. Said he knew a person with another Nash car. He called up that party on the telephone. In about a half an hour he arrived and this gentleman, Mr. Parker and myself went to examine the second car. It was in a private garage, presumably at the residence of his man. "I was not acquainted with this man. I had never seen him before, and I have never seen this man since." It was a five passenger Nash. The first car I purchased was a seven passenger Nash. We took this five passenger car over to a garage and had some work done on it. Took until six or seven o'clock. We went back to Fowler's Restaurant and closed the deal on the five passenger car. I presumed him to be the owner of it. I don't remember how long he said he owned it and don't know that I asked him from whom he purchased it. I didn't suspect anything wrong. I gave him $400.00 on this car and one of these $1,000.00 bonds. I paid him by $100.00 checks. One check was handed over to Mr. Fowler to cash. I was short of money and post dated two of the checks. The checks were payable to Mr. Parker. I told him, while I was buying the car from the other party, that I was dealing with him because I knew him. I drew up a bill of sale, which was signed by this gentleman who owned the car. Am not certain whether it was witnessed or not. There was a notation made thereon of the street address where he was supposed to live and the garage where I found the car was located. I gave that bill of sale to Mr. Campbell who testified yesterday. I had no suspicions or knowledge that the cars were stolen nor that the parties from whom I purchased them did not have good title. When the cars were fixed I brought them to Sioux Falls that night, Mr. Parker driving one of the cars and myself and Mr. Burke the other. When I got them to Sioux Falls I put them in the elevator and took them to the third floor in my building. That was Saturday morning that I arrived in Sioux Falls. On listening to the testimony yesterday I recall I had a check cashed in Sioux City about 2:30 o'clock in the afternoon and if it had been Saturday I could not have it cashed for the banks there are not open Saturday afternoons. The checks I gave to [fol. 75] Mr. Parker were drawn upon the Sioux Falls National Bank. One of them was cashed, the other two I stopped payment on when I heard from Mr. Campbell the cars were stolen. I first gave a verbal order and then a written letter to the bank. Exhibit "E", it is this letter. There was no changes in the cars or alterations in numbers after I received them. On Monday, January 9, I saw Mr. Campbell. Mr. Campbell and Mr. Pickett called and said I had two stolen cars upstairs. I said that is news to me, if they are I want to know it. Mr. Campbell asked me not to remove the cars from the garage and I said I would not. I told him I bought them in good faith in Sioux City and had a bill of sale in the office. I was then on the second floor of the building. We went up to the third floor and looked over the cars, then went down to the office, where I produced the bills of sale and gave them to Mr. Campbell, who took them right there and never gave them back. I tried to get them back by serving a notice upon the attorneys for the Government to produce these bills of sale before the opening of this trial. Outside of the

notations on the bills of sale I have no independent recollection as to the location where the cars were kept or the name of this lady who informed me she was the owner of them, nor the respective telephone numbers. After this proceedings was started I went to Sioux City and made a search, thinking I might possibly find the location and from that the address of the parties, but I was not successful. I also, at the same time, gave Mr. Campbell my sales book of the cars that I had sold in business and where I had purchased the same from July 1. Mr. Campbell asked about how many cars I had sold and I told him about 75 to 100. They were in the book which I gave him. This book Mr. Campbell never returned. I know Mr. Ball, he is a resident of the city. On January 9 about eight or nine in the morning he called upon me. This was before I had the first talk with Campbell and Pickett. He had left his own car in one of the shops in the building. His wife's mother was sick and he wished to go to Armour and I said go up and take one of my cars on the third floor. I think I had 10 to 15 there. I told him I had purchased a couple of Nash cars and he could take one of them if he wanted to. [fol. 76] The second time I saw Mr. Campbell that day he came rushing in and wanted to know what I was trying to do, getting away with one of the cars. I said I didn't know anything about it. He asked me who took out the car. I said perhaps Mr. Ball did. I promised him this morning he could take one of the cars. He said he wanted that car. I said all right, it was up at Ball's house. Before going to Ball's house it seems to me we drove down through town. I think Mr. Campbell was there in the police car at that time. We went out in that to Mr. Ball's house. Mr. Ball was not there. I asked Mrs. Ball where the car was and she said it was in the garage, that they were going to leave in an hour or so. We went out to the garage. I drove the car down myself, Mr. Campbell staying in the other car, and put it in Walkin's garage where Mr. Campbell wanted it stored. Mr. Burke was already under arrest before Mr. Campbell and myself went to look for this car. I heard him testify that he told him Burke had this car. I did not do so. I never got this five passenger car, the one Ball had, back into my possession. The seven passenger car remained in the garage. I continued to reside in Sioux Falls until March 1, 1922, when I with my family went on a farm I had, a mile north of Virgil, South Dakota. I took the seven passenger Nash with me. After the 9th day of January until I took this car up to Virgil, no one questioned my right to it. Campbell was back a few days after January 9th, 1922, to talk with me about these cars and I believe I ordered him out and never saw him after that. On the day I ordered Campbell out of the garage I did not ask him for the addresses or bills of sale. I was not interested in the address. I was more interested in seeing him out of there than I was in anything else. There were some W's stenciled on it as brought out in the testimony yesterday. On July 5, 1922, I traded it to the Aberdeen Nash Company, managed by Mr. Tilgner. At that time two or three of the tires bearing this identification mark of "W" were on the car. After I got the car I made no alterations or changes of any of the factory numbers. Mr.

Sherwood called on me the latter part of May in Virgil. There were two other parties with him. Mr. Sherwood came over to my car. My wife was sitting in the front seat. *Mr. Sherwood came over to my* [fol. 77] *car. My wife was sitting in front seat.* Mr. Sherwood was pretty well intoxicated, and did not look at the numbers on the car, and Mr. Smith did not come near the car. Mr. Sherwood was pretty well intoxicated, and did not look at the numbers on the car, and Mr. Smith did not come near the car. Mr. Sherwood came up and leaned against my car, and said he wanted to talk with me about a certain Nash car. There was nothing particular came up as his mind seemed to be wandering. He was not asking me about the car I was driving, but about the five passenger car which Campbell had taken from me. I told him Campbell had taken it. He said they were not on speaking terms, that Campbell had nothing to do with the car, that Campbell was an Iowa man. I then asked Mr. Sherwood if he knew anything about this, the seven passenger car, I was driving, and that Mr. Campbell claimed was a stolen car. He said nothing at all. I said this car is in bad shape, I have been waiting to see some of you fellows, I want to deal it off. He said go ahead and deal it off, we have got nothing on that car. I then drove back to the farm. Later a Mr. Woolridge came. He came out to me in the field, where I was driving the binder. He said he was after a Nash car. I said I had traded it off and he said where to. At first I refused to tell him. Told him it was none of his business. Mr. Woolridge talked very nicely for a while and finally said there is no harm in telling where you traded it off. I said at Aberdeen. He said will you go to Aberdeen. I said I did not have time I am harvesting. After a while I said when one of the shockers gets close by I will let him drive the binder, and I will go to Aberdeen with you. I then took the Buick car I had traded for and drove Mr. Woolridge and my wife to Aberdeen. I think Mr. Woolridge was mixed in his testimony yesterday when he said he called on me first and then went back to Virgil. As long as I had the Nash car no one informed me from his own knowledge or from authority which had been given him by any governmental source that this Nash car was a stolen car, or was stolen from Mr. Wendt. Mr. Wendt's name was first called to my attention by Mr. Woolridge. This was after I had traded the car off.

Cross-examination of Mr. Brooks:

When I sold my building about January 2nd, I was determined to go out of business. On January 5th I went to Sioux City, getting there on the Milwaukee about ten o'clock in the morning. I [fol. 78] had a deal for some cattle for a couple of Ford cars, or rather my brother had. It was like this, Mr. Weedon lives at McIntosh and he and my brother were dealing together considerably, and I had previously dealt them several cars, including three or four trucks for land and cattle. I know I was here Saturday, for I had a note due at the bank and went down and adjusted it. Mr. Burke was the first person I met in Sioux City that I knew.

Had known him thirty days or so. He had been in my garage off and on. He was friendly to one of the mechanics who rented a part of the first floor. He stayed with him quite a little, and I got to know him from being in the building. Mr. Burke was not with me for lunch the first day. I did nothing with regard to going to Sioux City and locating these places and hunting up Mr. Parker after Mr. Campbell told me about these cars being stolen, except I wrote him a letter care of the Hanson & Fowler restaurant, which I never got back. I also phoned the first week to Mr. Fowler, and told him to try to locate Mr. Parker. When I was in Sioux City two weeks after, Mr. Campbell was here, I did not attempt to see this woman. I did not know where to go. I did not see Mr. Parker. I did not go to his home and I did not go out to the place where the car was stored where I had seen the woman who advised me that the car had been there for some months. I did not go to the home of the woman who owned one of these cars and who had given George permission to sell it. Mr. Pickett or Mr. Campbell did not, when they were at my place on Monday or Tuesday, call my attention to the fact that the numbers on the car had been altered. I had looked at the numbers and saw nothing wrong with them. They were not changed after I got the cars. The night of the first day I was in Sioux City, we played cards in Billie Burke's room until two or three in the morning. I did not sleep with him that night for I had a room at the West Hotel. There were present in Billie Burke's room a couple of school friends of mine. It was on the 2nd day that I was in Sioux City about ten o'clock in the morning when I went out and examined this seven passenger car, that I met his woman. She had the key to the garage in the house. She said bring the key back please. I took the key back, [fol. 79] and said How long has this car been stored here, she said six or seven months. It was the seven passenger car I agreed to pay $300.00 for and one of these bonds in cash. It was travelers' checks, which i had from a few days before when I went to St. Paul. I received these checks from a man in Mr. Hamilton's office, whose name I don't recall, on a building deal. I had received a little cash and asked them to get me three or four hundred dollars in money and he brought me this in travelers' checks. This is the building I sold to Mr. Hamilton in St. Paul, his office being in Gilfallon Block. I had not contemplated at the time I was in St. Paul taking the trip to Sioux City. I always preferred travelers' checks to money. These travelers' checks had been made out, this other man indorsed them to me and I did not have to endorse them. In addition to these checks I gave him a $1,000.00 bond of the Upper Michigan Land Company. I was in the office of this company at St. Paul. I learned the amount of bonds and debts outstanding, but do not now remember. These facts were given me by Mr. Sterling, a lawyer friend of mine in St. Paul. I considered them, at the time, I turned these over to George Parker, worth 50 to 60c on the dollar. I did not take it up with the company since to ascertain whether George Parker had ever reported to them that he had the bonds, with a view of getting his location. These

bonds are just like currency, transferable. Shortly after I wrote the company and asked them to notify me if bonds of certain numbers came in. I suppose I kept a copy of that letter, but do not remember the number of the bond. These bonds were transferable by delivery. I mentioned these bonds to Mr. Parker on the first day I saw him and delivered the bonds to him on the next day. He said in the meantime he had investigated as to what they were worth. I don't remember if I told him where he might investigate. I paid $400.00 for the five passenger car and gave him one of the bonds. I paid the $400 by giving him $100.00 cash. Gave him a check which he had Mr. Hanson or Mr. Fowler go over and cash and three post dated checks. One of them was cashed. These checks were payable to George Parker. It was on those I stopped payment. I do not recollect whether I gave the bond to Mr. Parker [fol. 80] or the other gentleman. I said I am dealing with Parker and will make the checks out to Parker. These checks were sent here for payment, so the bank told me, and they turned them back. I did not take off these notations or memorandums that I had written on the bills of sale before delivering them to Mr. Campbell. I did not tell Pat Sherwood that I got these cars from the Wyckoff Garage. I got a bill of sale from George covering the seven passenger car before I began dealing for the five passenger car. I got a bill of sale from the gentleman supposed to own the five passenger for that car. I don't remember his name. I don't remember what kind of a looking fellow he was. He wasn't as tall a man as George and was heavier than George. I don't remember whether he was light or dark. I think George called him by his initials. I don't remember what name he signed to the bill of sale. Fowler said he was not acquainted with this man.

F. R. BALL, called as a witness for the defendant, testified he is 43 years old and is married, lives in Sioux Falls and knows the defendant. I could not swear that the date was January 9, 1922. but about that time I had a conversation with Mr. Brooks. My car had been in the shop in the Brooks Garage three or four days before that. This conversation was between eight and nine o'clock in the morning. It was the day I took the car out of the Brooks Garage to my house, which they went up and got and brought back. In the conversation I told Mr. Brooks I wanted a car to go to Armour, South Dakota. My wife's mother was sick. My car was not ready. Mr. Brooks said I could take one of his cars and drive to Armour. He took me up and showed me two Nash cars and said take either one of them. I did not take it then but later I went up and got it myself, took it down the elevator and out to my home. It was winter time and I put it in my garage. I then went to Mr. West's to get some numbers for the new year, which he had not used. When I came back the car was gone. I came down and saw Mr. Brooks.

Cross-examination of Mr. Ball:

Armour is one hundred miles from Sioux Falls. Intended to stay there a day or two before returning. There was nothing said between Mr. Brooks and myself about changing the number or putting on some new South Dakota number instead of the Iowa number. Run the car into the garage because I did not intend to [fol. 81] start until next morning. It had the wrong year's number on it. It was shortly afternoon I got the car. It was between one, two or three o'clock that I got back after getting Mr. West's numbers.

Louis A. Gray, called as witness for the defendant, testified: I am and for ten years past have been assistant cashier of the Sioux Falls National Bank and have general supervision of the clerks under me, also of the files and books of the bank. The bank keeps a book known as a stop payment record. When individuals having accounts in the bank have ordered the bank to stop payment on checks, we keep a record of such check. I know and knew Mr. Brooks in January, 1922. He had a checking account in the bank. On the 11th or 12th of January 1922 the Sioux Falls National Bank received a written notice from Mr. Rae Brooks asking that it stop payment on certain checks. Exhibit "B" is this notice. The O. K. on it indicates that letter was received and entry made on the stop payment register.

U. S. Attorney: We will concede that the defendant ordered the payment of these checks stopped and that the checks were not paid.

George W. Burnside, witness for the defendant, testified: That he is mayor of the City of Sioux Falls, where he has resided for the past forty years. Had known Mr. Brooks for the past six or seven years. The city building where his office is located is a block from Mr. Brooks' garage. That on January 7, 1922 he knew Mr. Brooks' reputation in the community for honesty, integrity and good citizenship and that it was good.

Dave McCullough, called as witness for the defendant, testified: That he is vice president of the Security National Bank: that Mr. Brooks banked with another bank; that he knew Mr. Brooks for four or five years and that prior to January, 1922 he knew Mr. Brooks' reputation for truth honesty and good citizenship and that it was good.

Ellis O. Smith testified he had lived in the community twenty-seven years, was one of the three commissioners of the City of Sioux

Falls. Has known Mr. Brooks for four or five years and prior to January 7, 1922 knew his reputation in the community for honesty, integrity and good citizenship and that it was good.

[fol. 82] JOHN P. BLEEG, witness for the defendant, testified that he lived in the community for over twenty years, was an implement and automobile dealer, had known Mr. Brooks for six or seven years, knew his reputation prior to January, 1922 in the community for truth, honesty and good citizenship and that it was good.

THOMAS HARDIMAN, witness for the defendant, testified that he lived in the community for forty five years. Had been city commissioner for over ten years; that Mr. Brooks' place of business was a block from his office. Had known Mr. Brooks six or seven years and prior to January 7, 1922 he knew his reputation in the community where he lived, that it was good.

W. J. ELWOOD, called as a witness for the defendant, testified: That he was an attorney and counsellor of this Court; was acquainted with the defendant, Mr. Brooks, having known him six or seven years and knew his reputation in the community for truth, honesty and good citizenship and that it was good.

Defendant rests.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Thereupon the defendant at the proper time requested the court in writing to give to the jury each of the following instructions, designating hereinafter as A to J. Each of which said requested instructions was by the Court refused, and to which ruling defendant excepted:

A. In the opinion of the Court there is no evidence in this case which by reasonable construction and intendment, tends to establish the guilt of the accused beyond a reasonable doubt. You are, therefore, instructed by the Court that it is your duty to return a verdict of not guilty in this case.

B. In view of the testimony introduced on the part of the United States, it appears the United States claims that this automobile was transported by Mr. Brooks from Sioux City, Iowa to Sioux Falls, South Dakota and then was stored by him in his storeroom at this place. The Court will say to you that where a party is accused of transporting such stolen property, knowing the same to have [fol. 83] been stolen, and then merely retains and continues on

in possession thereof, that there is no second or separate offense. In other words, the matters in the second count in this indictment are not sustained and upon the count the Court advises you to return a verdict of not guilty.

C. To this indictment against Mr. Brooks, he has entered a plea of not guilty. Upon this plea the law presumes him to be innocent of the charge here made against him and this presumption of his innocence must continue and abide with him until he is proven guilty of the charge beyond a reasonable doubt. In other words, this presumption of innocence is evidence itself created by law in his favor, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created. This presumption of innocence on one hand, supplemented by any other evidence the defendant may have adduced, and the evidence against him on the other hand, constitute the elements from which the legal conclusion of his guilt or innocence is by you to be drawn.

D. The first allegation probably which you are to consider in this case is, was A. E. Traschler (W. C. Wendt) the owner of the automobile described in the indictment, in the latter part of 1921. If you find from the evidence beyond a reasonable doubt, as herein defined to you, that he was such owner, then you will proceed further with your investigation. If you fail to find that he was such owner then it would not be necessary for you to proceed further, for the prosecution would have to stop there and it would be your duty to return a verdict of not guilty.

E. If you find that Mr. A. E. Traschler (W. C. Wendt) was the owner of such automobile at such time, the next question for you to investigate would be, was the same, while he was such owner, stolen from him that is, was it taken from him by stealth without his consent by a person for the purpose of appropriating it to his own use. [fol. 84] If you are not satisfied beyond a reasonable doubt that it was so stolen, then, of course, you should proceed no further and you would be obliged to return a verdict of not guilty.

F. If you find that such automobile was so stolen, then the next question for you to investigate would be, did Mr. Brooks receive such automobile, knowing the same to have been stolen. The law of the United States under which this prosecution is held provides that whoever shall transport or cause to be transported in interstate commerce a motor vehicle, knowing the same to have been stolen, shall be punished, etc. You will notice from this that before Mr. Brooks can be prosecuted under this statute that he transported such automobile, knowing the same to have been stolen, knowledge on the part of the defendant that such automobile was stolen is essential to constitute the offense. Unless you are satisfied from the evidence beyond a reasonable doubt that Mr. Brooks, at the time it is alleged he received this machine and transported the same from Sioux City to Sioux Falls, knew that it was stolen, it will not be necessary for you, of course, to investigate the matter further, for the

prosecution would have to stop there and you would, of course, return a verdict of not guilty.

G. The gist of the offense with which Mr. Brooks is charged is the actual state of his mind when he purchased these automobiles as to whether or not he knew such automobiles at the time he received them were stolen property. If he did not at such time know they were stolen property, then any subsequent knowledge which he might get in relation to the title to such property, or the fact that it had been theretofore stolen, could not in any manner affect him. In other words, if he received these automobiles without knowledge that they were stolen, subsequent knowledge, if he received it, that they were so stolen, would in no manner tend to establish guilt.

H. The Court in this case has admitted for your consideration alleged statements made by Mr. Campbell and Mr. Sherwood, as to [fol. 85] statements they made to Mr. Brooks to the effect that the cars in question had been stolen and that they had forbid him making further disposition of the same. *How* the Court instructs you that if Mr. Brooks did not have knowledge that these cars were stolen cars at the time he purchased the same, then the fact that he might subsequently have learned that they were stolen from these parties or other sources and might after such knowledge have disposed of the same, would in no manner tend to establish his guilt. In other words if he received the cars innocently the fact that he might not have followed the directions or request of these parties would not make him guilty. The Court also advises you that neither Campbell nor Sherwood had any authority under the law to forbid Mr. Brooks from disposing of those cars.

I. Under the laws of the United States no juror is permitted, nor should he permit himself to believe, that he is convinced that the defendant is other than not guilty until from all the evidence introduced he can say that he is satisfied to a moral certainty that the defendant is guilty of the crime charged. In other words, no juror is, or should be satisfied under the law that the defendant is guilty until he is satisfied to a moral certainty from all the evidence of the defendant's guilt. That is, he should be satisfied to such a degree that he would act upon such evidence without hesitancy in a matter of the utmost importance to himself.

J. If, after considering all the evidence in the case, including the presumption of innocence as herein explained to you, you are not satisfied that the defendant is guilty of the crime charged to such a degree that you would act without hesitancy in a matter of the utmost importance to yourself, then it becomes your duty to vote not guilty. In other words, if the evidence or lack of evidence on the part of the government leaves you in doubt, leaves you in such a state of mind that you are not satisfied to a moral certainty, leaves you in such a state of feeling that you would hesitate before you would act were a matter of the utmost importance to you dependent upon such evidence, then it is your duty to acquit.

[fol. 86] COURT'S INSTRUCTIONS TO JURY

Thereupon the Court on its own motion charged the jury as follows:

This defendant was indicted by indictments Nos. 2007 and 2008, both of them returned into this court and made a file of the court on the 20th day of October, 1922. Thereafter the defendant was duly arraigned upon these indictments and entered his plea of not guilty. Before the commencement of the trial such proceedings were had that an order was entered consolidating these two indictments, and thereafter, for the purpose of this trial, the two indictments are consolidated and combined, and instead of considering the issues as set forth in the two counts of No. 2007 and the two counts of No. 2008, there are the found counts in the two indictments.

As stated to you gentlemen, the defendant was duly arraigned and entered his plea of not guilty to these indictments. By that plea this defendant denies each and every material allegation in the separate counts in these indictments, and places upon the government the burden of showing to you, to each juror, beyond all reasonable doubt, the truth of the charge or charges against him.

This defendant, like all defendants charged with crime, is presumed to be innocent until such time as you and each of you are convinced beyond all reasonable doubt, of the truth of the charge or charges against him. This presumption of innocence goes with him and abides with him throughout every state of the proceedings until such time as you find from the evidence, or the lack of testimony, the truth of the charge or charges against him, beyond a reasonable doubt.

I speak to you of reasonable doubt. You have heard much said concerning it during this trial. What is reasonable doubt? It [fol. 87] means just what it states upon its face. Not an unreasonable doubt. Not a captious doubt conjured up by a juror for the purpose of releasing one who has been shown by the testimony beyond all reasonable doubt to the guilty of the offense charged. It is not easy for the Court to give to a jury of laymen a legal definition of reasonable doubt. You are informed however, that the Court is of the opinion that a juror has a reasonable doubt if after a full and fair consideration of all of the testimony in the case, in the light of the instructions that the Court has given you and will give you, if he cannot then say that he has an abiding conviction of the truth of the charge or charges against him. Such a conviction as would influence him and upon which he would be willing to act in the graver affairs of his own life.

You are the sole and exclusive judges of the credibility of witnesses. It is for you to say just what weight you shall give to each person who has testified upon the witness stand. In determining what weight you shall give to the statements of a witness, you take into consideration the interest of the witness, if any, in the result of the litigation; the bias or prejudice, if any, for or against the defendant; the opportunity of the witness to know the thing concerning which he testifies; the reasonableness or unreasonableness of the satements made by the

witness. And in the consideration of the statements of the different witnesses you may find that there has been a conflict in the statements made. That is, that witnesses have contradicted each other. You are advised that it is your duty as jurors to reconcile such conflicting statements upon some theory consistent with an intent upon the part of all the witnesses to tell the truth, because the law assumes that when a man goes upon the witness stand and is sworn to tell the truth, [fol. 88] that he will speak truthfully rather than falsely But if, after a full and fair consideration of such conflicting statements in the light of all of the testimony in the case, you cannot so reconcile them, then it is your duty to say where the truth lies; who has been mistaken; who has spoken truthfully; who, if any one, has spoken falsely. If you find that any one has gone upon the witness stand and knowingly and wilfully testified to that which he knew to be false upon a material issue in this case, then you may entirely disregard all of the statements of such witnesses, except in so far as you find him corroborated by other competent evidence; by other facts and circumstances, as you find them by competent testimony in this case.

Testimony has been received here from witnesses known as character witnesses. The Court instructs you that if you believe and find from the evidence, at the time this charge was made against the defendant, he was a man of good character, you should take such good character into consideration in passing upon the question of his guilt or innocence. Where there is a conflict in the testimony as to the commission of an offense like that charged in this case, evidence of the previous good character of the defendant should be considered by the jury in connection with all of the other evidence given in the trial, in determining whether the defendant would be likely to commit, and had committed, the offense in question. Good character is important to every man, and never more so than when he is put on trial charged with an offense, which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with such crime. There are cases where it becomes a man's sole dependence and may prove sufficient to outweigh evidence of the most positive character. If however, upon a consideration of all of the evi- [fol. 89] dence, including that touching this defendant's good character, in this case you believe, under your oaths as jurors, that he is guilty beyond all reasonable doubt, you should so find. Otherwise you should acquit him.

Testimony has been introduced here in this case and arguments of counsel have referred at some length to circumstances, to the circumstantial evidence in the case. You are advised that, as a matter of law, circumstantial evidence is legal evidence. You are instructed that it is settled by the decision of various courts in this country that circumstantial evidence is not only legal evidence, but also, that a well connected train of circumstances may establish in the mind of a juror the conclusiveness of a fact. The value of this kind of evidence consists in the conclusive nature and tendency of the circumstances relied upon to establish controverted facts. In criminal cases they must not only be consistent with the guilt of

the accused, but must be inconsistent with the innocence of the accused. Where a conviction depends on circumstantial evidence alone, the circumstances should not only all concur to show that the defendant committed the crime, but that they are also inconsistent with any other rational conclusion than the guilt of the defendant. That the circumstances proven should all connect or tend to connect the accused with the commission of the alleged crime, and the circumstances should be of such a character as to satisfy the minds of the jurors trying the case of the guilt of the accused beyond all reasonable doubt. The circumstances from which the conclusion is drawn should be fairly established. All the facts should be consistent with the hypothesis of guilt. The circumstances should have a conclusive nature. The circumstances, when alone relied upon for a conviction, or for the establishment of an [fol. 90] essential, necessary element in an indictment, should, by moral certainty, exclude every hypothesis but the one of guilt.

These indictments, gentlemen of the jury, after stating these rules of law that are to control you in the consideration of the evidence—reference is made to the statute under which these indictments are returned. It is Chapter 89 of the 66th Congress, 1919-1921, found on Page 324, Volume 41, Part 1, Public Law.

The term, Motor Vehicle, shall include automobile, automobile truck, automobile wagon, motorcycle, or any other self propelled vehicle not designed to run on rails.

The term, Interstate and Foreign Commerce, as used in this act, shall include transportation from one state, territory, or District of Columbia, to any other state, territory or District of Columbia, or from any state, territory or District of Columbia to any foreign country, or from any foreign country to any state, territory or District of Columbia.

Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished, etc.

That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle moving as, and which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen shall be, etc.

Now, gentlemen, this indictment was drawn under these sections 3 and 4. The first count in each indictment is drawn under section 3. Whoever shall transport or cause to be transported in interstate or foreign commerce, a motor vehicle, knowing the same to [fol. 91] have been stolen, shall be punished, etc.

Indictment No. 2007, charges in the first count that the defendant, alleging the jurisdiction, etc., then and there, knowingly, wilfully and feloniously, did transport and cause to be transported, in interstate commerce, from Sioux City, in the State of Iowa, to Sioux Falls in the State of South Dakota, a certain motor vehicle, to-wit: Then it describes the seven passenger Nash Automobile, the property of W. E. Wendt, alleging that it has been stolen.

Count one of Indictment No. 2008, is exactly the same except

that it refers to the five passenger Nash automobile, and the ownership is in Traxler instead of Wendt.

Count Two of Indictment No. 2007, is as follows: (Omitting the purely formal parts) Then and there knowingly and wilfully did receive into his possession, conceal and store, a certain Nash touring automobile, which said Nash automobile was moving as, and it was then and there a part of interstate commerce.

You will observe from my former reading of Section 4, and I will read it to you again, that whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, and which is a part of or which constitutes interstate or foreign commerce.

Count two in each of these indictments does not refer or does not charge this defendant with having bartered, sold, or disposed of these cars. The charge is that he received it into his possession, concealed and stored. Those words are within the statute. Whoever shall receive, conceal, store, and then, those words denote and refer to an act, each independent of any other.

Having these provision- in view, what, then, are the issues pre- [fol. 92] sented here? Necessarily, gentlemen, the first thing that occurs to you under this statute is, What was transported? What is alleged to have been transported? Is that within this statute? You are advised, that, as a matter of law, if Nash automobiles, such as have been described, here, were transported, and you find beyond a reasonable doubt that they were transported, from Sioux City in the state of Iowa, to Sioux Falls, in the state of South Dakota, that such transportation would be within the prohibition in this particular statute. Whoever (that refers to the person) shall transport or cause to be transported, in interstate or foreign commerce, a motor vehicle, (such as is described here in this indictment) knowing the same to have been stolen—I repeat, knowing the same to have been stolen, shall be, etc.

You will therefore see that the entire gist of this offense as charged in the two counts 1, of the two indictments, 2007 and 2008, the fact is alleged that there was a violation of this statute, that there were two motor vehicles transported in interstate commerce from Sioux City, Iowa to Sioux Falls, South Dakota, and that the defendant caused these cars to be so transported. But that is not sufficient. It is also within the terms of the statute, and appears upon the face of the indictment, that the defendant caused such interstate transportation knowing the same to have been stolen, alleging first that they had been stolen, and that he made the transportation knowing them to have been stolen.

Count 2, in each of the two indictments, refers in the other section. Whoever shall receive, conceal. I may say to you, gentlemen, that [fol. 93] as far as the receipt of these cars is concerned, under the evidence in this case, that, as a matter of law, they were not received into the possession of this defendant in this jurisdiction. Therefore, under the word "receive" in the indictment, there would be no sufficient evidence here to convict this defendant, and if that were the only charge in this indictment, the court would advise you to acquit the defendant. However, pursuing the statute further, whoever shall

conceal, store, any motor vehicle, moving as, and which is a part of, and which constitutes interstate or foreign commerce, knowing the same to have been stolen shall be punished, etc.

That pre-supposes knowledge on the part of the defendant at the time named in these two last counts, that he concealed and stored these automobiles, with knowledge upon his part of that fact.

You are advised, gentlemen of the jury, that in the orderly procedure in determining the issues that are presented here, the first question that naturally arises is, Was there a violation of this prohibition set forth in this statute? Was there a transportation of a motor vehicle in interstate commerce? If that should be resolved against the prosecution and in favor of the defendant, that would end the case. Of course, if there was no automobile transported here, there would be no offense. If, however, you find, beyond all reasonable doubt, that automobiles were actually transported from Sioux City, Iowa, to Sioux Falls, South Dakota, at the time and place named, then you would proceed to determine the issue; Were those [fol. 94] automobiles stolen? Had they been stolen? The one belonging to Wendt and the other to Traxler. Now, if they were not stolen cars, then the transportation of them, even if they were transported, would not be within this statute. Therefore, the next question is, Were these automobiles actually stolen from the owners, and the owners, the persons named in the indictments? If you should fail to find beyond all reasonable doubt that these cars were actually stolen, then that would end this case, because this statute only prohibits the transportation of automobiles that have been stolen. If, however, you find beyond all reasonable doubt that these cars were stolen from their respective owners as alleged in the indictment, then your next consideration is, Did this defendant transport these automobiles from the city of Sioux City, Iowa, to the city of Sioux Falls, South Dakota? If he did not transport them, or cause them to be transported, or if you fail to find beyond all reasonable doubt that he transported them or caused them to be transported, that would end this case, and you would not need to consider the matter further. If, however, you should find, beyond all reasonable doubt, that the defendant did transport these cars at the time and place named in the indictment, from Sioux City, Iowa to Sioux Falls, South Dakota, then you would proceed to the consideration of the other questions. Did the defendant know the cars had been stolen? Do you find from the testimony, beyond all reasonable doubt, this knowledge on the part of the defendant at the time he transported these cars, that the cars were stolen? In the event that you do not find, beyond all [fol. 95] reasonable doubt, after a full and fair consideration of all of the testimony, that he knew they were stolen when he transported them, then your verdict must be for the defendant. If, on the other hand, you find he did transport them, knowing them to have been stolen, with the other facts that I have referred to, then he would be guilty under this statute, because that is the thing that is prohibited by the statute. The statute does not prohibit the driving of cars from Sioux City to Sioux Falls, it only prohibits the driving of stolen cars. It is not enough to establish a criminal intent upon a

person simply to prove that he drove the car. It must also be shown, beyond reasonable doubt, that he knew the cars were stolen at the time the cars were transported. You will, therefore, see, gentlemen, that in the determination of this issue that is presented here, as is generally the case in criminal cases, the good faith of this defendant is at issue. The defendant asserts that he had no knowledge of the stealing of these cars. You determine that fact in the light of the testimoney that has been introduced, giving to the testimony such consideration as you, under your oaths as jurors, believe it is entitled to, taking the testimony that has been introduced and the reasonable inferences that an ordinarily prudent man could and should draw from the statements that have been made upon the witness stand, determining where the truth lies and determine the issue accordingly.

I repeat to you gentlemen, that I am of the opinion, that under [fol. 96] the facts in this case, under the undisputed facts that the possession of these cars came to this defendant, if at all, in Sioux City, and not in the jurisdiction of this court.

In the second count of these indictments the question is: Did this defendant conceal and store these cars in this jurisdiction; in this state, after transporting them from Sioux City in the State of Iowa, to the City of Sioux Falls in the State of South Dakota, knowing the same to have been stolen? To refer to the elements making up that crime is to repeat what I have said with reference to the other.

In the consideration of this case, under these two indictments, the real issue is the good faith of this defendant. This defendant asserts, as he has a right to, and by his denial he does assert as well as deny the other allegations of the indictments, that he had no knowledge; that he acted in good faith; that in the driving of these cars, and in the storing of these cars and concealing them in this city, one or both of them, he acted in the best of good faith, believing that he had a right to purchase them; that he did purchase them and both of them and that he was not possessed of facts that placed within his possession guilty knowledge. What I have said to you about driving the cars from Sioux City to Sioux Falls without knowledge that the cars had been stolen, applies with equal force to the storing and concealing of cars in this jurisdiction, if you should find that he did so, because the mere possession of the cars and the storing of the cars is not a crime within itself. If it is a crime it is because the [fol. 97] cars are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen.

The court permitted certain testimony to be received showing conversation with the defendant in the city of Sioux Falls, the next day, or the second day, after the alleged transportation of these cars. This testimony was entirely proper. It was competent, and it was the duty of the court to permit its receipt. I may say to you, however, in the light of the argument of counsel, that as a matter of law, from what may appear or what does not appear in the testimony in this case, you would not be justified in finding that either Campbell or

Sherwood had any right to the possession of these cars, nor did the fact that they gave that notice render it the duty of this defendant to turn the cars over to them or either of them, except as some proofs where brought to his attention of the truth of the assertions made by them. The thought that the court had in calling it to your attention is that the court does not want the jury to understand that it is the opinion of the court that either of these men had the right to come and take possession of these cars, or direct what should be done with them, independent of any showing upon their part, and independent of any action on their part to get possession of them.

Something was said in your presence and hearing to the effect that when this notice was given that whatever Brooks did after that was [fol. 98] done with guilty knowledge. You are advised that the court is of the opinion that that is a matter for you to determine from all of the evidence. What effect Brooks should have given to such notice as you find was given to him. Just as you determine his good faith from the time of the inception of his connection with this transaction until the close. You place upon all of the circumstances as they are revealed in the testimony, and as you find them beyond all reasonable doubt, such interpretation as appeals to your best judgment under your oaths as jurors.

The court thinks of nothing I can add to what I have said that would be of aid or assistance to you in reaching a verdict. Take this case, give to it your best judgment, and return such a verdict as appeals to your judgment under your oaths as jurors. When you have retired to your jury room you will select one of your number foreman. When you have agreed upon a verdict, your foreman in your presence will sign your verdict and you will be conducted into court and your verdict will be received and made a file of the court.

You are advised in this case that it is necessary for you to find a verdict under each of the indictments. You will bring in two verdicts. The cases have been consolidated and yet it is necessary that there shall be a verdict upon each indictment. If you should find the defendant not guilty, your verdict will be: We, the jury find the defendant not guilty as charged in the indictment. That would cover both counts. If that were true under indictment 2007, you would make it in that number. The two verdicts just alike, ex- [fol. 99] cept for the numbers, if you find alike in each case. On the other hand, you may find him guilty upon either of these indictments and not guilty upon the other. You may find the defendant guilty on one single charge contained in the two indictments and not guilty upon any as to the others. Or not guilty on one single charge and guilty as to the others. It is for you to consider each of these four charges separately and determine your verdict upon all four of them independently. The Clerk has prepared the form of verdict, we, the jury find the defendant guilty as charged in the indictment; We, the jury find the defendant not guilty as charged in the indictment; We the jury, find the defendant guilty as charged in count one or two, and not guilty as to the other count. These three forms will cover any verdict you can find under these indict-

ments. I think you will have no trouble with the form of the verdict, and you will have the indictments with you.

Mr. Kirby: We call the court's attention and ask the court to advise the jury that if Brooks acquired the cars without guilty knowledge in Sioux City, having paid for the same, if they subsequently proved to be stolen cars, he became the owner as against every person in the world except the real owner, and therefore he would not be obliged to give them up to anybody only the real owner.

Further, if he purchased the cars in Sioux City, without guilty knowledge of the fact of their having been stolen, and brought them to Sioux Falls, without such knowledge, then information subse-
[fol. 100] quently imparted to him, after he had got to Sioux Falls, by the agents of the government or other source, would not make them stolen cars as to make him liable for storing them subsequent to that time.

The Court: I don't think your statement is a statement of the law under this statute, and it is therefore refused. The court is of the opinion, as suggested by counsel, that the defendant must be found to have had a guilty knowledge of the fact that these cars were stolen when he drove them from Sioux City to Sioux Falls. He is not guilty of having received these cars, knowing them to have been stolen, unless he is guilty under the first count. Because, if he is guilty of receiving those cars, knowing them to have been stolen, it is because of the knowledge he had in Sioux City when he drove the cars here. On the other hand, he may be guilty, under the provisions of this statute as to concealing and storing the cars, even though he did not have that information when he took the cars in Sioux City and when he drove them to Sioux Falls. Under the testimony here, it is possible, the court is of the opinion, for you to find that he became acquainted with the fact that they were stolen cars, and knew that they had been transported in interstate commerce and were within the provisions of this statute and were stolen. Now, if, under those circumstances, he did store and conceal them, the court is of the opinion that the second count would constitute an offense, and proof under it would be sufficient to sustain a conviction.

[fol. 101] Defendant excepts to the last part of the instructions and to the last statement of the Court in substance to the effect that they might find Mr. Brooks guilty under the second count, even though he brought the cars to this State innocently, because such cars would cease to be interstate commerce and come under the jurisdiction of the State alone.

The Court: I don't think so

[fol. 102] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—Filed Jan. 10, 1924

In the above entitled action the defendant, Rae Brooks, having duly presented to this Court the annexed bill of exceptions therein and the District Attorney approving of the same and said bill of exceptions appearing to the Court to be in all things correct:

Now, therefore, I the undersigned Judge, before whom said action was tried and at the term when such trial took place, do hereby certify and allow the annexed bill of exceptions, consisting of pages 1 to 47 inclusive as the bill of exceptions in said action and all the exceptions therein set forth are hereby severally settled allowed and sealed accordingly and the same is hereby ordered filed as the bill of exceptions in said action.

It is further certified that said bill of exceptions contains all the evidence introduced in this action, together with the charge of the Court in full, the instructions requested by the defendant, the rulings thereon and exceptions as taken.

Done at a day of the October, 1923 term of the District Court, to-wit: January 10, 1924 at Sioux Falls, South, Dakota.

Jns. D. Elliott, Judge.

[fol. 103] [File endorsement omitted.]

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE PRECIPE FOR TRANSCRIPT OF RECORD

It is hereby stipulated and agreed between E. D. Barron, Assistant United States Attorney for the District of South Dakota, and Messrs. Kirby, Kirby & Kirby, attorneys for the defendant, that the foregoing and attached request for papers to be forwarded on appeal and none others shall constitute the record on appeal to be transmitted by the Clerk of the District Court of the United States for the District of South Dakota, Southern Division, to the Clerk of the Supreme Court of the United States on writ of error.

Dated at Sioux Falls, South Dakota, this 16th day of January, A. D., 1924.

E. D. Barron, Ass't United States Attorney for the District of South Dakota. Kirby, Kirby & Kirby, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 18, 1924

[fol. 105] Under the Writ of Error issued in this action, please forward to the Clerk of the Supreme Court, constituting a record on appeal, the following papers:

1. The two indictments which were consolidated and upon which the defendant was tried.

2. The demurrers to each of said indictments and the orders with exception overruling the same.

3. Bill of Exceptions, with certificate of Judge, settling same.

4. Verdicts.

5. Motion in arrest of judgment and order denying the same.

6. Sentence of defendant.

7. Citation.

8. Writ of Error.

9. Assignment of Errors and prayer for reversal.

10. Motion for new trial and order, with exceptions, denying the same.

11. Affidavit of Wilson Powers and Rae Brooks as to newly discovered evidence.

12. Order for Consolidation.

Kirby, Kirby & Kirby, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 106] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States, in and for the District of South Dakota, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 105 pages, numbered consecutively from 1 to 105, inclusive, is a true and complete transcript of the record, pleadings, orders and sentence, as enumerated in the written Præcipe of the party appellant and the stipulation of the parties to this case filed herein, directing the Clerk what parts of the record and

papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the admission of service thereof, the original Writ of Error with my return thereto, and in addition thereto a copy of said Præcipe and Stipulation.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, in the said District, this 30th day of January, A. D. 1924.

Jerry Carleton, Clerk. (Seal U. S. Dist. Court, Dist of South Dakota.)

Endorsed on cover: File No. 30,121. South Dakota D. C. U. S. Term No. 286. Rae Brooks, plaintiff in error, vs. The United States of America. Filed February 12, 1924. File No. 30,121.

BRIEF FOR PLAINTIFF IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 286

RAE BROOKS,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

KIRBY, KIRBY & KIRBY,
BIELSKI, ELLIOTT & MARKER,
Attorneys for Plaintiff in Error,
Sioux Falls, South Dakota.

Mark D. Scott 1-15-25

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IN THE

Supreme Court of the United States

No. 286

OCTOBER TERM, 1924.

RAE BROOKS,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

OUTLINE OF PROCEDURE.

The grand jury for the District of South Dakota returned two indictments against Mr. Brooks, who owned and was operating a garage in Sioux Falls, South Dakota, whom we will hereafter refer to as the defendant, under the National Motor Vehicle Theft Act. Each of these indictments contained two counts, the first of which seeks to charge him with, on January 6, 1922, transporting a stolen automobile from Sioux City, Iowa, to Sioux Falls, South Dakota, the second count with receiving, concealing and storing such car at Sioux Falls, South Dakota. The indictments are similar in all respects both with regard to time, acts and manner of procedure, except that a different automobile is described in each. Demurrer to each of the several counts (5-8) of the respective indictments were interposed, because the facts stated did not accuse the defendant of a public offense and did not inform him of the nature and cause of the accusation against him, as required by Article 6 of the Bill of Rights and that the National Motor Vehicle Theft Act was in violation of the Federal Constitution. These demurrers

(Whenever figures appear in ( ) they refer unless otherwise stated to the page of the printed record).

having all been overruled an exception saved, defendant pleaded not guilty. During the course of the trial many exceptions are saved by the defendant, both to the improper admission and rejection of testimony, as well as to the mode of procedure by the prosecuting attorney. At the close of the evidence (42) a motion for a directed verdict was made and refused. Exception was also taken to certain instructions given, as well as requests refused. A general verdict of guilty (10) having been returned upon all the counts in the respective indictments, and a motion in arrest of judgment was overruled (11) and exception saved. Application was then made to the Court for a new trial (15), for among other grounds, on account of newly discovered evidence favorable to the defendant. This having been denied and exception saved, the Court sentenced the defendant to 18 months imprisonment at Leavenworth on each of such counts, such imprisonment to run concurrently. The case comes here by writ of error.

STATEMENT AS TO FACTS.

The defendant Mr. Brooks was at the time of the trial 31 years of age. Had lived in Sioux Falls, South Dakota, (34) for eight years, during which time he had married, having three children at the time of the trial. Had erected in a prominent part of the city a three story and basement fire proof garage, with his office therein on the first floor and one-half of the upper floor for storage and sale room, renting the remainder of the building to divers parties. He appears (40-41) to be a man of the highest standing in his community, as may be gathered from the uncontradicted testimony of his neighbors, including the mayor, councilmen, bankers, lawyers and others of Sioux Falls. A short time before the transaction charged against him, he sold his building preparatory to removing with his family to his farm near Virgil, South Dakota, taking as part payment some bonds in (35) the Upper Michigan Land Company, but still retaining possession of the part of the building which he had been occupying. An opportunity presenting itself to trade some small cars for cattle to stock his farm, Mr. Brooks went to Sioux City where after visiting several garages, he purchased from one George Parker, a stranger to him, but a party vouched for by some residents of Sioux City, the two Nash cars above mentioned. One at least bore an Iowa (40) license number. Mr. Brooks at the time traded a bond in the Michigan Land Company on each of the cars,

paid some cash and the remainder by checks on a Sioux Falls Bank. These cars were immediately together brought to Sioux Falls, Mr. Brooks driving one and Mr. Parker and Mr. Burke whom he hired for the occasion, the other. Upon arriving into Sioux Falls, they were placed in Mr. Brooks' store room in his garage.

We thought that regardless of the number of packages brought in interstate commerce, that if it constituted one transaction or one shipment, it could be but one offense. The trial court, however, took the contrary view, and submitted each car as a separate matter to the jury. It is not our understanding neither from the indictment, for it does not so allege, nor from the evidence, for it does not so prove, that Mr. Brooks at the time he purchased and moved these cars from Sioux City to Sioux Falls had any knowledge that such cars had been stolen. In fact neither the State nor Federal authorities who investigated the matter, claimed to have possessed at the time, any such information. The principal witness on the part of the Government on this branch was one W. S. Campbell, an Iowa official assigned as investigator of stolen cars. (21) Mr. Campbell testified at the time he had no knowledge such cars had been stolen, but his business being that of an investigator, and thinking they might possibly be such, followed Mr. Brooks to Sioux Falls, and the next day, after examining the cars, advised him that he believed they had been stolen. Mr. Campbell then sent a telegram to an investigating bureau in Chicago (23) describing the cars and asking if there was any record of such offense. No answer appears to have been received from such bureau. Mr. Campbell also claimed at the time he discovered the numbers on one of the cars had been altered. Mr. Brooks (41) upon receiving this information from Mr. Campbell, stopped payment upon the checks, which he had given in part payment of the cars. There is some slight disagreement as to the movement of one of the cars, which we will refer to as the five passenger car, in the city of Sioux Falls the day Mr. Campbell saw Mr. Brooks. But we think the evidence not only fails to show guilt in the storage and handling but shows by a decided preponderance that all of such movements were innocent. Mr. Campbell at this time seized one of the cars, (probably without authority) and removed it to another garage, when in the course of a week he with the former owner, Mr. Traxler, took the car, and as far as the evidence goes have retained the same ever since. The other car referred to as the seven passenger,

remained in Mr. Brooks' garage until the spring following, without any claimant appearing, when Mr. Brooks took it to his farm where he had removed with his family near Virgil, something over a hundred miles distance, and later about the middle of the summer traded for another car with a dealer in Aberdeen. Later a party, Mr. Woolridge, and an adjuster for an insurance company who had a risk on this seven passenger car, called upon Mr. Brooks, with the result that Mr. Woolridge and Mr. Brooks went to Aberdeen, where this seven passenger car was turned over to Mr. Woolridge, who removed it to Sioux City.

ASSIGNMENT OF ERRORS.

Now comes the defendant, Rae Brooks, in this action and respectfully states and says that the trial court erred to his prejudice as follows:

1. In overruling the demurrer (6-7) filed by the defendant to each count in the indictments for the reasons therein set forth and particularly that such indictments do not inform him of the nature and cause of the accusation against him as required by Article 6 and would have the effect of depriving him of his liberty without due process of law under Article 5 of the Bill of Rights of the Federal Constitution and that the Act of Congress under which such indictment is found, namely, the National Motor Vehicle Theft Act, is not authorized under any of the powers conferred upon the National Government, but is an act by Congress to trench upon the police laws of the respective states.

2. In ruling and deciding (in the charge to the jury) that where a motor vehicle had been stolen and transported in Inter-state Commerce, that a party who had innocently received (52) the same before having knowledge that the same was stolen could be guilty under the National Motor Vehicle Theft Act of concealing, storing, selling or disposing of such vehicle, by reason of his subsequently being informed that such car was so stolen.

3. That the evidence in this case is not sufficient to show that Mr. Brooks had knowledge that the cars in question had been stolen at the time he purchased and removed the same from Iowa to South Dakota, viz:

a. It does not appear from such evidence that even the inspectors or agents of the Government or State of Iowa had any such knowledge, either at the time (see testimony of

Mr. Campbell, Printed Record p. 22, after cars were in Sioux Falls) or subsequently when interviewing Mr. Brooks, in Sioux Falls or at Virgil. (See testimony of Mr. Sherwood, Printed Record p. 24, as to knowledge in May, 1922, also testimony of Mr. Woolridge, Printed Record p. 26, as to knowledge in July following).

b. The evidence shows Mr. Campbell was, while in Sioux Falls, attempting to ascertain if such cars had been stolen, but possessed no such knowledge.

c. That recent unexplained possession of stolen property may be evidence the possessor is the thief, but it is not evidence against an alleged receiver of stolen property, that he had knowledge it was stolen.

d. That where a party in good faith receives by purchase or even gift, property, which he later has reason to believe has been stolen, he is not obliged to return the same until the claimant proves his title and such possessor's title is good against the world, except the real owner.

4. That if Mr. Brooks received the cars innocently the statements of Mr. Campbell and Mr. Sherwood, neither of whom at the time knew from whence or whom such cars had been stolen, nor that the same were stolen, but only suspected it on general principles, their statements to Mr. Brooks would give no higher information than their own knowledge, a mere suspicion, not based on facts and he, Brooks, would not be required to act upon the same.

5. That where a party purchases such vehicle, even with guilty knowledge, and moves the same in inter-state commerce, his subsequent retention, whether it be in driving, placing in garage or selling, does not constitute a separate offense, Section 4 of such act relating to necessarily only to third parties who have received the vehicle.

6. The Court should have sustained (42) the motion made by the defendant at the close of the case and advised the jury to then return a verdict of acquittal.

7. The Court erred in the following regards on evidence during the course of the trial:

a. In striking out from the testimony of Mr. Dwight his statement "At the time he (Brooks) said this, Mr. Campbell stood within four feet of us and could not but help (27) to have overheard the conversation."

b. In allowing Mr. Dwight to be cross examined as to whether he had made statements that he had suffered large losses (27) on account of his dealings with Mr. Brooks.

c. In overruling the defendant's objection and allowing the U. S. Attorney to interrogate Mr. Burke (32) to the effect if he had not stated to him that he, Brooks, was to get $50.00 to accompany Mr. Brooks to Sioux Falls and that the offer was such a large amount made him, Burke, suspicious that the car had been stolen.

d. In allowing the U. S. Attorney, in the presence of the jury to ask if Mr. Burke (33) had not signed a statement to the effect that he suspected the cars were stolen, because Brooks had offered him $50.00 to accompany him on such drive and in allowing such question to be repeated, asking if he, Burke, had not made similar statements to Mr. Sherwood and upon the witness answering, do you not so remember asking him if he would deny he made such statements.

e. In excluding the offer (34) to use Mrs. Brooks as a witness in this case for the purpose of impeaching the Government's witness.

8. The U. S. Attorney committed prejudicial error to the rights of the defendant in asking Billie Burke (33) with regard to statements and conversation to the effect that he, Burke, believed the cars in question were stolen and that he, Burke, had stated he was to receive $50.00 for accompanying the same from Sioux City to Sioux Falls, a distance of less than one hundred miles.

9. The Court erred in not giving as instructions to the jury the requests made by the defendant, to-wit:

a. In refusing to give the first instruction requested (42) to the effect that there was no evidence in the case which by reasonable construction tended to establish the guilt of the accused beyond a reasonable doubt, and they should therefore return a verdict of not guilty.

b. In refusing to give the following instruction: In view of the testimony introduced on the part of the United States, it appears the United States claims that this automobile was transported by Mr. Brooks from Sioux City, Iowa, to Sioux Falls, South Dakota, and then was stored by him in his store room at this place. The Court will say to you that where a party is accused of transporting such stolen property, knowing the same to have been stolen, and then merely

retains and continues on in possession thereof, that there is no second or separate offense. In other words the matters in the second count in this indictment are not sustained and upon this count the Court advises you to return a verdict of not guilty.

c. In refusing to give the following instruction: (43) To this indictment Mr. Brooks has entered a plea of not guilty. Upon this plea the law presumes him to be innocent of the charge here made against him, and this presumption of his innocence must continue and abide with him until he is proven guilty of the charge beyond a reasonable doubt. In other words this presumption of innocence is evidence itself created by law in his favor whereby his innocence is established until such evidence is introduced to overcome the proof which the law has thus created. This presumption of innocence on one hand supplemented by any other evidence the defendant may have adduced and the evidence against him on the other hand, constitute the elements from which the legal conclusion of his guilt or innocence is by you to be drawn.

d. In refusing to instruct the jury that if Mr. Brooks acquired the cars without guilty knowledge in Sioux City, having paid for the same, if they subsequently proven to be stolen cars, he still remained the owner as against every person in the world, except the real owner, and therefore would not be obliged to give them up to anybody only the real owner. Further if he purchased the cars in Sioux City without guilty knowledge, and brought them to Sioux Falls without such knowledge, the information subsequently imparted to him after he had got to Sioux Falls, by the agents of the Government or other sources would not make them stolen cars, so as to make him liable for storing them subsequent to such time.

10. The Court erred in charging the jury (52) that he (Brooks) may be guilty under the provisions of this statute as to concealing and storing cars, even though he did not have information that they were so stolen when he took the cars at Sioux City and when he drove them to Sioux Falls. Under the testimony here it is possible the Court is of the opinion for you to find that he became acquainted with the fact that they had been stolen cars and knew that they had been transported in inter-state commerce and were within the provisions of this statute and were stolen. Now, if under the circumstances he did conceal and store them, the court

is under the impression that the second count would constitute an offense, and proof under it would be sufficient to sustain a conviction.

11. In denying defendant's motion for a new trial for all the reasons above set forth and in particularly the newly discovered evidence presented by the affidavit of Wilson Powers.

12. In overruling motion in arrest of judgment.

13. In sentencing the defendant under two separate indictments which evidently constituted the same act.

14. In sentencing upon two counts in each of said indictments.

The assignment of errors can, we believe, be properly considered under the following

POINTS

1. That the indictments fail to inform the accused of the nature and cause of the accusation under Article 6, and seeks to deprive him of his liberty without due process of law contrary to Article 5 of the Bill of Rights. Post p. 8-13.

2. That the National Motor Vehicle Theft Act is not authorized under the Inter-state Commerce Clause of the Constitution and is contrary to Article 10 of the Bill of Rights. Post p. 13-19.

3. That there is no evidence of defendant's guilt and the jury should have been so advised. Post p. 19-24.

4. Errors occurring at the trial in the receipt and rejection of the evidence. Post p. 24-30.

5. Errors in instructions given and refused. Post p. 30-32.

6. In overruling Motion in Arrest of Judgment. Post p. 35.

7. Errors in refusing a new trial and sentencing the defendant four times for the same overt act. Post p. 32-34.

ARGUMENT.

Insufficiency of Indictment.

The finding of a sufficient indictment by a grand jury is jurisdictional and a right which the accused, under the constitution, cannot be deprived.

Re Bain 121 U. S. 1.

Every ingredient of which the crime is composed must be positively and clearly alleged.

U. S. vs. Cook 17 Wall. 174

U. S. vs. Cruikshank 92 U. S. 542

Regina vs. Martin 9 C. & P. 215.

Where a writ of error is taken directly to this court in a case in which the constitutionality of a law of the United States is involved, this court acquires jurisdiction of the whole case and of all the questions involved in it and not merely the question of the constitutionality of the law.

Horner vs. U. S. 143 U. S. 570.

Jin Fuey May vs. U. S. 254 U. S. 189.

The first count of the indictments in this case, for they are both the same except as to the name of the owner of the respective automobiles, charge the defendant (2, 4) "Then and there knowingly, unlawfully and feloniously did transport and cause to be transported" an automobile, the property of one Wendt, while Section 3 of the National Motor Vehicle Theft Act, claimed to have been violated, condemns whoever shall transport a motor vehicle "Knowing the same to have been stolen shall be punished." In other words, the indictment in this respect charges Mr. Brooks with knowingly transporting the vehicle and not with transporting a vehicle known by him to have been stolen. Such indictment then alleges the theft of this automobile, without stating where, how or by whom stolen and continues "Nor did the said Rae Brooks then and there have the consent and permission of the owner of said automobile to transport and cause to be transported said automobile from Sioux City in the State of Iowa to Sioux Falls in the State of South Dakota, all of which he, the said Rae Brooks, then and there well knew." As we understand the English language and in view of the statement at the opening that the defendant knowingly transported the automobile, the antecedent of the closing phrase "All of which he, the said Rae Brooks, then and there well knew," is the statement immediately preceding the same as above set forth, to the effect that he knew he did not have the consent of the owner to move the car.

Probably nothing is more near elementary in criminal law than that the charge in the indictment must be positive, direct, certain and specific, must cover every act necessary to constitute the crime sought to be charged and that nothing

can be added by inference or intendment and meet the constitutional requirements. In other words, there must be an accusation, not a dragnet.

1 *Chitty* C. L. Page 171.

1 *Bish.* N. C. P. Sec. 508-520.

1 *Whar.* C. P. (Kerr) Sec. 194.

What we have said above with regard to the first count in each of those indictments, applies and modifies the second count in the indictment. For instance, the second count alleges a receipt of said car by Mr. Brooks in Sioux City, Iowa, on January 6, 1922. We have pointed out heretofore that there is no charge in the first count properly laid that Mr. Brooks at the time knew such car was stolen. The same applies to the second count, except that the antecedent of the last clause in such count, namely, "All of which the said Rae Brooks then and there well knew contrary to the form, etc.," is that on the 7th day of September, 1921, or four months prior to the time he received the car, that he knew it had been stolen from Mr. Wendt, but there is no allegation that at the time he is claimed to have stored or concealed it (the court in its charge (48) held the question of receiving was not within, for reason given, to be considered), such knowledge had not passed from his mind or in other words, there is no charge under the second count that at the tme he is alleged to do those acts he had in mind it had been stolen. This guilty knowledge must have been in the mind of the defendant under the first count at the time he transported the car and under the second count at the time he stored or concealed it. If we are correct in this respect, we are safe in saying that it should have been, but has not been, alleged in the indictment.

In *Peterson vs. U. S.* 213 Fed. 920 it appears the defendant was indicted under Sec. 288 of the Penal Code with buying stolen cattle. The statute provides:

> "Whoever shall buy * * * * * any money, goods, * * * * * or other things which may be the subject of larceny which has been feloniously taken, stolen or embezzled from any other person, knowing the same to have been so taken, stolen or embezzled, shall be fined, etc."

The Court of Appeals of the 9th Circuit, upon reversing the case on account of errors in the instructions of the trial judge, said:

"The gist of the offense is the actual state of the defendant's mind when he purchased the property. * * * * * The ultimate fact which the jury must find before a conviction is warranted, is that the defendant had such knowledge, and knowledge is something more than suspicion.

The Court then quotes from the case of *State vs. Rountree* 61 S. E. (S. C.) 1072 with approval wherein this latter court said:

"Knowledge of the theft on the part of the receiver is an essential element of the offense and such knowledge must exist at the moment the property is received."

As we remember at the trial it was urged that a condition shown to exist would be presumed to continue during the period of time alleged in the different dates before the count. As we understand it, this is a rule of evidence, however, and not one of pleading with which we are dealing under the demurrer of the indictment.

In *Fredericks vs. Tracy* 33 Pac. (Calif.) 750, which was an action in replevin commenced on the 19th day of November. The complaint alleged that the plaintiff was the owner and entitled to the possession of the property in controversy on the 17th day of November. In answer to the contention of plaintiff that such complaint was sufficient upon the theory that ownership once shown to exist is presumed to continue, the Court said:

"It is a cardinal principle in pleading that ultimate, and not probative facts are to be pleaded. The ultimate fact in such an action is that plaintiff was at the time the action was commenced the owner of, or had some special property in, the chattel, coupled with a right to the immediate possession thereof. The fact that he was the owner and entitled to the posseseion at a previous date is evidence, from which the ultimate fact may be deduced, upon the principle that 'a thing once proved to exist continues as long as is usual with things of that nature.' * * * * * There is nothing in the complaint to show that at the time the action was commenced the plaintiff had any ownership or right to possession of the property and for this reason the judgment is reversed."

In the very early case of *Sir Nicholas Pointz*, Cro. Jac. 214 has been followed without question, we believe, by the English speaking courts as to material averments. That was an indict-

ment for forcible entry which described the land as "Being the free hold of J. B." It was held that the indictment was fatally defective because "It was not alleged *ad tunc existens* for it may be that the land was a free hold of J. B. at the time of finding the indictment and not at the time of entry."

So in the instant case, the defendant under the indictment is charged with having knowledge on the 7th day of September that Mr. Wendt's car had been stolen, but this can hardly be taken as equivalent to a statement that such matters had not passed from his mind prior to the alleged concealing and storing four months later.

The whole indictment is fatally defective in that it fails to allege from whom the defendant is accused of receiving the stolen property.

In *U. S. vs De Barre* 6 Biss. 358: Fed. Cases 14935, which was a prosecution on the charge of receiving stolen postage stamps the Court said:

> "I regard the point as conclusively settled upon authority. In *State vs. Ives* 13 Ire. 338, it was held that an indictment for receiving stolen goods must aver from whom the goods were received, so as to show that the person charged received them from the principal felon. If he received them from any other the statute does not apply."

In 2 *Bish N. C. L.* Sec. 1140 we find the following:

> "If the goods have been transferred from the thief to a guilty receiver, it is but a truism that the latter is a receiver, not a thief. In his hands, therefore, and as to him, they are not stolen. Their character, in his hands, is derived from his offense, not the prior possessor's. So that one who receives from the receiver, however wickedly, is not guilty of receiving stolen goods."

In *Foster vs. State* 106 Ind. 272 the Court says:

> "To render the offense of receiving stolen goods possible the goods must retain their stolen character at the time the party charged received them. If therefore, the goods have been transferred from the thief to a guilty receiver, the latter takes as a receiver and not as a thief. In his hands, and as to him, the goods are not stolen. In his hands the character of the goods is derived from his offense, and not from the offense of the person who stole

them, so that one who receives goods from him, however wickedly, is not guilty of receiving stolen goods, either within the common law or statutory definition of the offense."

The National Motor Vehicle Theft Act is not authorized under the Interstate Commerce Clause of the Constitution and is in conflict with Article 10 of the Bill of Rights.

The Federal and state governments are separate and distinct sovereignties, the one within the sphere of its delegated power is supreme; the other within the sphere of its un-delegated and reserved powers is no less supreme.

M'Culloch vs. Maryland 4 Wheat. 316: 4 L. Ed. 579. The state of Maryland sought to tax an instrumentality of the Federal Government within that state. There was no actual limitation in the Federal constitution upon the power of the sovereign state to levy such tax, but the court through its Chief Justice looked beyond the mere limitation of words and saw the principles upon which each of the sovereignties, acting within its sphere were based, and upon common ground must be preserved. This the constitution intrusted, not the good sense of congress or the judgment of the state legislature, but absolutely prohibited either from interferring with the sovereignty of the other. The Chief Jpstice said:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect of those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."

Some 20 years after the decision of *M'Culloch vs. Maryland,* the State of Pennsylvania sought to tax the salary of a federal official within its bounds. *Dobbins vs. Commissioners* 16 Pet. 435; 10 L. Ed. 1022 the Court said:

"The compensation of an officer of the United States is fixed by a law made by Congress. It is in its conclusive jurisdiction to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States,

which secures it to the officer in its entireness? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional."

The founders of our government with wisdom, which now seems prophetic, appear to have done all that human judgment could devise to preserve this balance of power, not only between the different departments of the Federal Government but between the States and Nation. They realized that one of the human characteristics that would have to be met of those in power, has ever been a desire to extend authority. Congress almost from its inception has, to a greater or less extent, sought to trench upon the reserved power of the State.

Buffington vs. Day 11 Wall. 113; 20 L. Ed. 122. Here was not a case of the state seeking to use means which might ultimately destroy the Federal Government, but the Federal Government seeking to use means, which if allowed, could be extended so as to destroy the State. The Federal Goxernment in this instance sought to tax the salary of a state official. Again this court extended its hand and said to the Federal Government, stop, the power is not yours.

A chief executive once asked Congress to practically abdicate in his favor, its constitutional power to declare war by authorizing him to "Employe any other instrumentality or methods that may be necessary and adequate to protect our ships and our people."

So we are constantly confronted by each of the sovereignties seeking to grasp power delegated or reserved to the other. Not only this, but the heads of the different departments are constantly reaching out for greater power, often without regard to constitutional limitations, which petty officials of both state and nation, under the guise of enforcing some law, violate the most sacred rights of the home and cause the ordinary citizens to wonder if he longer has any rights sacred from their acts.

When the powers of the state over its internal affairs is destroyed or the delegated power of the United States allowed to be infringed, the system of government devised by the constitution can not long survive. Is it not safe to say that were it not for the courts, with watchful eye, carefully guarding the demarcation between Federal and State power, that this great western republic would long since have ceased to exist. It is with pride that I mention this matter, for while our armies and

navies have rendered acts of heroic valor, all would have been useless but for the court ever guarding the fundamentals on which our government is founded. Its motto ever has been and let us trust will always be *obsta principiis.*

Is the act of Congress which we are discussing fairly one of the powers granted to it under the commerce clause of the constitution; Does it properly "Regulate commerce * * * * among the several states" or is its purpose and effect to trench upon the policy power of the respective states?

In the recent case of *Bailey vs. Drexel Furniture Company* 259 U. S. 20; 66 L. Ed. 817. Congress had sought by indirect means, under its taxing power, to do that which this court had on a prior occasion determined it had not the constitutional power to do under the Interstate Commerce Clause. This court was not to be misled by a form, but properly looked at the whole purpose of the act and said:

> "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it? * * * * We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. * * * * Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are preserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."

In *Hammer vs. Dagenhart* 247 U. S. 251: 62 L. Ed. 1101 it appeared that Congress, under the Interstate Commerce clause of the Constitution sought to prohibit interstate shipment of articles manufactured where minors of a certain age were employed. While conceding that the power of Congress under Section 8, Article 1 of the Federal Constitution to regu-

late commerce among the several states was unlimited, the court looked through this make believe subterfuge and said:

> "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. * * * * The grant of power to Congress over the subject of Interstate Commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. * * * * The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in Interstate Commerce all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated; and thus our system of governmnet be practically destroyed."

Hard cases make bad law. We think when this Court upheld the constitutionality of the white slave law, *Hoke vs. U. S.* 227 U. S. 308; 57 L. Ed. 523 and likewise the pure food and drug act, *Hipolite Egg Co. vs. U. S.* 220 U. S. 45; 55 L. Ed. 364, also the anti-lottery act, *Champion vs. Ames* 188 U. S. 321; 47 L. Ed. 492, that it went to the very extreme limit which we may ever expect it to go. In fact, one might be led to believe that at the time such holdings were made, the thought expressed in the words of the Chief Justice in *Bailey vs. Drexel Furniture Co., Supra* "The goods sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without the thought of the serious breach it will make in the ark of our covenant," was not before the Court.

Even if Congress possessed the power to enact Section 3 of the act in question, prohibiting the interstate transportation knowingly of a stolen motor vehicle, still there must be some point in the procedure where this interstate control will cease. There must be some point where the State can again assume jurisdiction over such vehivle. In interstate commerce this has been, we believe, always determined by the article reaching its primary destination. In the instant case, the destination in the movement of the cars was the defendant's garage in Sioux Falls. To this place he brought and in this building placed them. The Trial Court, to which we have already call-

ed your attention, instructed the jury that Mr. Brooks was not guilty under Section 4 of receiving these cars at Sioux Falls and eliminated that question, so it is no longer before us, the court saying: (48)

> "I may say to you, gentlemen, that as far as the receipt of these cars is concerned, under the evidence in this case, that as a matter of law they were not received into the possession of this defendant in this jurisdiction, therefore, under the word 'receipt' in the indictment there would be no sufficient evidence here to convict this defendant and if that were the only charge in this indictment, the Court would advise you to acquit."

The court then submitted to the jury the question of whether the defendant was guilty of concealing or storing such cars after they had reached the City of Sioux Falls. It is our contention that whatever was done with the cars after they reached their destination in interstate movement would be clearly beyond the Federal jurisdiction and a question solely for the State courts. In fact we think a careful reading of Section 4 will disclose that such was the purpose of Congress. This section reads:

> "Whoever shall receive, conceal, store, barter, sell or dispose of any motor vehicle *moving as or which is part or which constitutes interstate or foreign commerce* knowing the same to have been stolen, shall be punished, etc."

This section, as we read it, means and can mean nothing more than the law forbids the aiding, and assisting or knowingly concealing, storing, etc., the vehicle while it is in the course of transportation to its destination. In other words, it seeks to render more difficult the acts forbidden by Section 3, but does not seek to retain jurisdiction over it after it has ceased interstate movement. Under the evidence admitted by the trial court and the instruction given to the jury, a matter of which we will have more to say later, post p. 32, the learned trial judge took the view that such car once stolen and wrongfully moved across the state line, continued to retain its characteristics and contaminate, so far as to be within the jurisdiction of the Federal Court, all who might thereeafter, with knowledge of its condition, handle the same.

By the act of June 3, 1902, 32 Stat. L. 285, Congress sought to assume jurisdiction over migratory and insectivorous birds.

In the case of *U. S. vs. McCullagh* 221 Fed. 288 Justice Pollock held the act unconstitutional, pointing out that the power to pass such an enactment was not conferred either by the general welfare clause or by the interstate commerce clause of the Constitution, the Court saying:

> "No matter how laudable the purpose of Congress in the passage of the act in question may have been, or how great the ultimate end sought thereby to be attained for the common good, such end does not justify the means employed, if it be found on examination to lie beyond constitutional bounds. In such event, the only proper course lies in amendment of the constitution."

The same view was strongly expressed in the case of *State vs. Sawyer* 113 Maine 458; 94 Atl. 886, the Court among other things saying:

> "Certainly the passage of wild birds in their flight from one state to another is not commerce between states. However difficuut it may be to define with precision the term 'Commerce', as used in that clause of the National Constitution."

There is another question of public policy which the Court will not ignore, even though the matter pertains more to congressional legislation than to the judicial determination of the Court and that is the glutting of our Federal courts with comparatively small matters, all of which a short time ago were left by Congress properly to the police power of the respective states. It is well known that owing to the organization of the different bureaus, departments, clerks, investigators and what not, employed by the Federal Government in such matters, has raised the cost of handling such cases several hundred per cent above what it had formerly cost the state or county. We think the words of Justice Bourquin, 281 Fed. 547, in refusing an application of the U. S. Attorney to file an information under the Migratory Bird Treaty Act is worthy of consideration, wherein he says:

> "In justice to counsel these are of that anomalous class of cases wherein, not the Department of Justice, but some bureau or other, is authorized to investigate and direct prosecuitions, wherein counsel has no discretion, but obeys orders (Probably some bureau clerk's) from Washington, in this respect the repository of all power, if not of wisdom in equal degree, and by reason of which counsel

so often constrained to prosecute against his better judgment."

Or possibly the language of the same Judge, 277 Fed. 69-71, may more accurately express the question in our mind, wherein it is said:

> "It is true Congress is constantly restricting the jurisdiction of the Federal courts, in only important causes, however, for it is also true that it is constantly extending their jurisdiction to trivial causes and to causes virtually filched from the states' police power, until they are crowded with white slavers, pimps, prostitutes, and panders, drug peddlers and addicts, bootleggers and poachers. This court was lately horrified to find all its machinery in motion and with a jury engaged in trying (God save us) five reputable citizens upon a charge of having joint possession of one dead hell-diver."

There is no evidence of defendant's guilt and the jury should have been so advised.

In all cases where this question has arisen, the writer has experienced much difficulty. It is proving a negative, the nonexistence of evidence, by pointing out where in the transcript it is not. Of course, the whole of the evidence can only be grasped by reading the bill of exceptions (p. 21-42). However, it is our contention that there is no evidence in this case which legitimately tends to prove that the defendant had any knowledge the cars were stolen at the time he received the same in Sioux City, nor, if the Federal Court has any jurisdiction, that he had such knowledge when he handled the same, as disclosed by the evidence, after the same reached their destination.

The first witness on the part of the Government, Mr. Campbell (21) an investigator of stolen cars for the state of Iowa testified that seeing the defendant and some other parties in these cars at Sioux City leaving for Sioux Falls, he followed them to the latter place. At the time Mr. Campbell had no knowledge (22) and possessed no information that the cars in question had been stolen, but upon arriving in Sioux Falls, in company with Mr. Pickett, then chief of detectives of the latter place, examining the cars and procuring their numbers, he wired an investigating bureau in Chicago to ascertain if they had any record of such cars being stolen. The evidence does not disclose that he received any answer to this telegram, but he did (possibly because he was a detective and suspicious) in-

form Mr. Brooks that he believed they were both stolen cars. An expression of such belief by a person who has neither knowledge or information upon which the same is based, will hardly, we believe, be claimed by the government to be of such a grade as to require the defendant to act thereon. In fact, the Trial Court so instructed the jury when he said (50):

> "I may say to you, however, in the light of the argument of counsel, that as a matter of law, from what may appear or what does not appear in the testimony in this case, you would not be justified in finding that either Campbell or Sherwood had any right to the possession of these cars, nor did the fact that they gave that notice render it the duty of this defendant to turn the cars over to them or either of them, except as some proofs were brought to his attention of the truth of the assertions made by them. The thought that the court had in calling it to your attention is that the court does not want the jury to understand that it is the opinion of the court that either of these men had the right to come and take possession of these cars, or direct what should be done with them, independent of any showing upon their part, and independent of any action on their part to get possession of them."

The law, of course, requires the jury to accept this statement of the Court. The facts which lead to these remarks by the Court, were that the government emphasized the fact that Mr. Campbell at the time, did take the five passenger car, store it in an independent garage and a week later, deliver the same to the owner. He also took the starter button from the seven passenger car, which remained in Mr. Brooks' possession, where Mr. Campbell claims (probably a mistake) to have seen it as late as July 11 following. (22) After this conversation with Mr. Campbell, which he claims was on January 9, 1922, nothing further seems to have been done until the May following, Mr. Brooks in the meantime having moved with his family to a farm near Virgil, South Dakota and taken the seven passenger car with him.

A. P. Sherwood (24), who designates himself as a special agent for the Department of Justice, testifies that he met Mr. Brooks in Virgil in May, 1922 in possession of this, the seven passenger car, and states the matter as follows:

> "I practically knew at that time who claimed to be own-

er of the car. I think I told Mr. Brooks that the car was a stolen car and I thought the owner was an Omaha man. I told him the car should not be disposed of until the matter had been thoroughly thrashed out as to the rightful owner."

The June following Mr. Brooks traded this car (25) to a dealer named Mr. Tilgner.

The evidence bearing on this subject is by an insurance adjuster J. C. Woolridge (25) who, on behalf of the government testified that he called on the defendant at his farm near Virgil, South Dakota in July, 1922, relative to this seven passenger car. That Mr. Brooks told him he was no longer the owner of the car and it did not matter to him where it was. Later Brooks stated he traded the car in Aberdeen. He, Brooks, went with Mr. Woolridge to Aberdeen where a trade back was made with Mr. Tilgner and this car taken by Mr. Woolridge. At the time Mr. Woolridge testified: "I knew nothing of it being stolen."

The above seems to be all the information of the cars having been stolen possessed by any of the witnesses who had called on Mr. Brooks and all the statements made to him from which the prosecution claims he argued such guilty knowledge. We are at a loss to understaand how the jury could be allowed to impute to him a greater knowledge, from such statement, than his informants possessed. The remainder of the evidence at the trial, as we recall it, which was relied upon in argument and argued to the jury, was that Mr. Campbell claimed Mr. Brooks had not informed him correctly as to what had become of the five passenger car between the different times he, Campbell, was at the Brooks garage. Mr. Campbell's version is as follows: (22)

"Right after dinner (January 9) myself and Mr. Pickett went back to the Brooks garage and just as we got to the door this five passenger Nash was driven out * * * I asked Mr. Brooks who drove out the Nash car (5 passenger) just as we came up. He said a man naemd Billie Burke drove it down to the Virginia Cafe. Mr. Brooks took a Buick Coupe and drove Mr. Pickett and myself down past the Virginia Cafe. Nobody was there, finally he drove us out to a man's house by the name of Fred Ball and there in Fred Ball's private garage was this five passenger Nash. I asked Mr. Brooks what Mr. Ball was do-

ing with the car and he said he wanted to drive it to Rock Rapids, Iowa."

Mr. Pickett (28) who was with Mr. Campbell at the time, gave his version of this latter transaction as follows:

"I also was with Mr. Campbell at the Brooks' Garage on January 9. Mr. Campbell and myself met Mr. Brooks at the Brooks' Garage on Monday between ten and eleven o'clock in the forenoon. We talked about the cars. The supposition was they were stolen. Brooks said he bought them at Sioux City and paid for them in various ways, checks, money, bonds or something. Brooks was asked if he had any bill of sale for the two cars in question. He answered that he had. We asked him where it was at and he answered down stairs, in the office. We then went down stairs to the main floor of the building where the desk was. Mr. Brooks had some papers. He represented to me that they were the bills of sale for these two cars. Campbell was there in my presence. I don't know what became of the bills of sale or the papers he represented to be the bills of sale, because I didn't read them. These papers were placed where all of us could see them. We were all there together probably three or five feet apart. We were interrupted at the time by Mr. Burke coming in. Mr. Campbell wished him (Burke) arrested for having stolen property in his possession, that was his directions to me, so I took him over to the police station. Before the arrest of Burke, Campbell and Mr. Brooks and myself went down to the restaurant to see if we could find Burke and then came up to the building afterwards. This was about dinner time I expect. We came back to the garage about one o'clock, and saw a Nash car going out. I learned later it was Mr. Ball that was driving it. We went in and asked Mr. Brooks why he had moved those cars, if he was trying to get rid of one of them, and he said no, he was not. A few more questions and he told he had agreed to lend the car to Mr. Ball in the morning before we had our first talk with him and if Mr. Ball took one of the cars it was unbeknown to him. Mr. Campbell said if you know where it is, we will take a car and get it. Mr. Campbell and Mr. Brooks went after it, I did not. At the time this car was taken away, to the best of my recollection there was nothing said by Mr. Brooks to the effect that it had been taken away by Burke, and that they would go down to the

restaurant and chase him up, because Mr. Burke was in jail at that time."

Mr. Campbell (22) also testified that at the first time he was in the garage he noticed the figures in the number of one of the cars had been changed from 3 to 8. However, it will be noted that the telegram which he later sent to the bureau in Chicago used the figure 8 (23) in describing the car.

The government tries to give the impression and was successful before the jury, that Mr. Brooks was secreting or getting rid of the five passenger car and gave a false statement as to where it had gone at the time Mr. Ball had the car, by saying that one Billie Burke had taken it down to the cafe, and led them on a wild goose chase to such cafe. Mr. Pickett claims Mr. Burke had been arrested, at Mr. Campbell's request, prior to this time and was then in jail and that the man who took down the five passenger car was Mr. Ball. Also that the defendant and Campbell left together for Ball's place instead of the cafe. Mr. Ball (40) corroborates the statement as given by Mr. Pickett.

We have examined the record with some care and the above contains all the testimony under which the government claims the defendant gained his information that the cars in question had been stolen. On the other hand, Mr. Compbell and Mr. Pickett testified that Mr. Brooks informed them what he had paid for the cars when he received them. Mr. Brooks (36) paid part of this by post-dated checks, payment of which he immediately stopped upon Cambepll communicating to him his suspicion the cars had been stolen.

Louis A. Gray (41) the assistant cashier of the Sioux Falls National Bank, upon which the checks had been given, testified to the bank having received such notice to stop payment. At this point the U. S. Attorney conceded "That the defendant ordered the payment of these checks stopped and that the checks were not paid."

Mr. Campbell denies having taken the bills of sale which Mr. Brooks had received from the party from whom he had purchased the cars. Mr. Brooks (36) asserts this. Mr. Pickett (28) testifies such documents were produced to himself and Mr. Campbell. Mr. Dwight (27) testifies that the defendant in his presence stated that he had given such bills of sale to Mr. Campbell, to which Mr. Campbell offered no denial. Mr. Fowler (23) another government witness, at whose place in

Sioux City such bills of sale were claimed to have been written up, testified that while he did not read such documents, he heard the parties talking about bills of sale and saw Mr. Brooks write them out.

Mr. Brooks' testimony occupies five pages (35-40) in the record and we ask you to take time to read it. To us it is a simple statement of a business transaction, not open to even suspicion and explains quite fully and concisely how he came to acquire the cars in question. The evidence of the different character witnesses of the highest grade (41-42) indicate that Mr. Brooks' reputation was all that could be desired in the community where he resided at the time the transactions charged are alleged to have taken place. Under these circumstances, we think, we are justified in saying that there was no evidence upon which the Court would be justified in submitting the question to the jury of the defendant having any knowledge that the cars had been stolen at the time he moved the same from Sioux City. That under the ruling of the Trial Court and its instructions given, as we have heretofore pointed out, there was no evidence that at any time while he had possession of the cars in Sioux Falls did he make any attempt to secret, conceal or store the same with guilty knowledge, or at all, unless the placing of the car in a garage is of itself a storing under this section. Under these circumstances, we say the Trial Court should have given the first of defendant's requested instructions (42) to the effect that there was no evidence in the case that would justify the jury in returning a verdict other than not guilty.

Errors occurring at the trial in the receipt and rejection of evidence.

The defendant called T. W. Dwight (27) as a witness, who was present at an interview between Mr. Brooks and Mr. Campbell. The issue was that the defendant claimed Mr. Campbell had taken away the bills of sale which he, Brooks, had received from George Parker, from whom he had purchased the car and on which was written the addresses of the places in Sioux City where the cars had been theretofore stored. Mr. Dwight testified:

> "Mr. Brooks introduced him to Mr. Campbell and said, this man says that the cars I brought from Sioux City were stolen cars. Witness said if so, tell him absolutely everything you know about it. Who did you buy the cars of? Mr. Brooks told me and I said, did you get a bill of

sale? He said yes. I said, where is that bill of sale? He said, I gave it to Mr. Campbell. This was in an ordinary conversational tone. At the time he said this Mr. Campbell stood within four feet of us and could not but help to have overheard the conversation."

At this point the United States Attorney moved: "I move the last sentence be stricken out, it is not responsive." The Court: "It may be stricken out." The record does not show the question to which this answer was made, but if an answer is proper it is only the party who asks the question that is entitled to object, because it is not responsive to his question. If the party asking the question is willing to accept the answer and it is germain to the issue, then it must stand. It would seem to us to be very material to show that Mr. Campbell was within hearing distance of this conversation and that he could not help but hear it.

Along the same line it will be noticed that on cross examination of Mr. Dwight the prosecuting attorney asked:

> "Did you at that time say to Mr. Campbell in substance that this man, referring to Brooks had practically broken you and cost you about $60,000.00 or $70,000.00, or words to that effect."

Objection to this having been overruled the defendant answered:

"I don't recollect that I did. Q. by U. S. Attorney: "Did you tell him at that time that Brooks had cost you a large sum of money?" A. "I may have."

We submit that this is one of those insidious questions well fitted to prejudice the jury and effect the verdict. There was nothing, however, in the examination of Mr. Dwight or any other witness that had justified such procedure. If erroneous, it was prejudical.

Along the same line (32) the prosecuting attorney was allowed, over objection, to adopt the following method in cross examining Mr. Burke:

> Q. by U. S. Attorney: "Did he, Mr. Brooks, or did he not in that conversation when he asked you to come up here tell you he would give you $50.00?" (Mr. Burke was one of the parties Mr. Brooks had hired to drive the cars from

Sioux City to Sioux Falls) A. "I don't exactly remember the proposition. He promised to pay me. I did not say it. I don't remember what he said the amount was. I know the amount was worth it to me. I remember having a conversation in your office on this matter day before yesterday." Q. by U. S. Attorney: "Don't you recall saying to me and to Mr. Barron and Mr. Clark and to the men in whose charge you are now, that Mr. Brooks at that time told you he would give you $50.00 if you would drive up with him, and the fact that he offered to pay you so much made you suspicious it was a stolen car?"

The objection of the defendant because this was improper cross examination, incompetent, hearsay to any issue in the case, being overruled, the defendant answered:

A. "If I answer that question I would say this, that I did not say myself it was fifty dollars. I said I didn't know how much was offered."

Witness than admitted signing Exhibit 2, a document produced by the U. S. Attorney, which was not offered in evidence. The U. S. Attorney then proceeded:

"I call your attention to that part of this exhibit (Exhibit 2) in which you say that he stated to me he was buying the car so he could afford to pay me $50.00 to accompany him on this drive, that Brooks did not tell me—"

At this point the defendant's counsel interrupted (33) the prosecuting attorney and objected to this procedure as trying to use something before the jury not in evidence, leading and suggestive. The Court overruled this objection and the U. S. Attorney continued:

"These cars were stolen. That his offer to pay me $50.00 for the drive convinced me that they were stolen. Did you know when you signed this exhibit that that statement was contained therein?

Objection to this whole question was sustained, but we say the damage was done in asking the question. In fact, we can hardly believe the learned attorney even thought such question could be proper.

Q. by U. S. Attorney: "Did you on or about the 21st day of March, 1923, at Ft. Madison Penitentiary say to Pat Sherwood, that in the conversation had with Mr. Brooks in Sioux City on or about the 8th day of January,

1922, he offered you $50.00 to accompany him with these cars from Sioux City to Sioux Falls?"

Proper objection being interposed to this and being overruled, the defendant answered:

A. "I don't remember. Q. "Do you deny that you made that statement to Pat Sherwood?"

Objection having again been interposed and overruled, the witness answered:

A. "I do not deny I made the statement." Q. by U. S. Attorney: "Did you not at the same place and at the same time say to Pat Sherwood, that Brooks did not tell you these cars were stolen, but that his offer to pay you $50.00 for the drive convinced you that they were?"

Upon defendant's objection the Court said: "Gentlement of the jury, such a statement—not proper evidence and you shall disregard it."

Q. by U. S. Attorney: "Did you or did you not say to Pat Sherwood at this time that the defendant Brooks offered to pay you $50.00 for asisting in driving these cars from Sioux City to Sioux Falls, having reference now to the Nash cars?"

A. "I did not mention the amount. I made the statement not including the amount."

The probative effect on a jury, not composed of lawyers and we may properly assume, not men even familiar with Court procedure, of these statements by the Honorable U. S. Attorney, in whom, next to the judge, they probably have the most implicit confidence, we submit was such as to prevent the defendant from having, what the constitution and law gives him, a fair and impartial trial. The gist of the proceedings was whether the defendant knew these cars were stolen at the time to which the questions asked by the U. S. Attorney relate. If the defendant offered to pay this party $50.00 merely to drive a car, in company with others, a distance of 100 miles, it would indicate something wrong and while it is true the witness denies having made such statement still the questions asked and not answered and the questions asked beyond the possibility of answer, were such that this Court, we believe, cannot say that the jury did not remember and consider the same.

The Court also erred in excluding the wife (34) of the de-

fendant, whom we called as a witness for the purpose of contradicting and impeaching the testimony of the government witnesses, whose statements were given in her presence. We are aware of the ancient rule of law relative to the effect of coverture upon the wife, which has become as foreign to our modern institutions as the laws of the Medes and Persians. The reason for this rule, if any ever existed, having ceased, the rule itself should cease and we understand has ceased in many of the districts.

In *Johnson vs. U. S.* 293 Fed. 383 the wife testified in behalf of her husband, the Court of Appeals merely saying: "His wife tends to corroborate him in the circumstances of completion of the exchange."

We are aware that in the recent case of *Jin Fuey Moy vs. U. S.* 254 U. S. 189 that this Court has held that as the wife would not be competent to testify under the Judiciary Act of September 24, 1789, she would not at the present. We are also aware that this Court has never hesitated to change its ruling on procedure when the surroundings have changed. We are aware that for a long time, the test of whether a crime was a felony and infamous was measured by a ruling of the common law and not by the rule of punishment. As all crimes in the Federal Court were statutory, this became somewhat embarrassing and the Court then adopted the common sense doctrine, and measured a felony by that which might be punished with imprisonment in the penitentiary.

In the case of *Rosen vs. U. S.* 245 U. S. 467 the question was whether a party who had been convicted of a felony, an infamous crime, was competent to testify as a witness in the U. S. Courts.

In the case of *U. S. vs. Reid* 12 How. 361 the Court held that the competency of witnesses in criminal trial of a U. S. Court must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 was passed. Later as stated in the Rosen case, the decision in the Reid Case was shaken, but not overruled, by the decisions in *Logan vs. U. S.* 144 U. S. 263 and in *Benson vs. U. S.* 146 U. S. 325. In the Rosen case the Court overruled the Reid case and holding such witnesses competent said:

> "In the almost 20 years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses

has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather that by rejecting witnesses as incompetent * * * * * We conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

Do not the reasons set forth in the Rosen case apply fully in the instant case, where the only person present to a conversation between her husband and a detective, is the wife. As said in the Rosen case: "In the light of general authority and sound reason", would not we be more apt to arrive at the truth, by allowing this wife to testify, leaving her credibility to the jury, than by adhering to "The dead hand of the common-law of 1789."

All great changes that work for the benefit of humanity have arisen from a minority. For this reason, we take the liberty to call this Court's attention to the dissenting opinion of Justice Stone in the case of *Adams vs. U. S.* 259 Fed. 214 where the question of the competency of the wife to testify on behalf of the husband was before the Court, the Justice saying:

> "I cannot conclude that such a purpose is consumated by closing mouths which both husband and wife wish opened to prove lack of criminality by either. Is the marriage relation or is society benefited by preventing a husband or wife from coming to the aid of the other in a time of dire need, and to promote justice?"

We respectfully call this Court's attention to Vol. 1 Sec. 601 of Wigmore on Evidence, in which, after analyzing the five different reasons which have been given by courts from the day of Sir Edward Coke to the present time for excluding this class of testimony, the learned writer concludes:

> "In short, the possibility of falsification by wife or husband is no more a reason for exclusion than the same possibility by a person pecuniarily interested; and the objectionable inconsistencies and irrational quibbles which

disfigure the rule are as much apparent in the one form as in the other. * * * * * It deprives honest cases of upright testimony for the sake of preventing dishonest causes from using false testimony."

There can be no doubt in the mind of the writer but what the rule for which he contends will sooner or later, by this Court, be adopted. In the words of a famous advertisement "Eventually, why not now?"

———o———

Errors in instructions given and refused.

We have already treated upon requested instruction A (42), namely, that the Court should have instructed the jury to return a verdict of not guilty for lack of evidence and hence, on that branch have no more to say. We have likewise covered requested instruction B to the effect that under the evidence there could be no conviction under the second count, because at most the defendant merely continued the possession which he had received in Iowa and which he retained in moving the car to South Dakota and that such charges only apply to a third party. Requested instruction C (43) is as follows:

"To this indictment against Mr. Brooks, he has entered a plea of not guilty. Upon this plea the law presumes him to be innocent of the charge here made against him and this presumption of his innocence must continue and abide with him until he is proven guilty of the charge beyond a reasonable doubt. In other words, this presumption of innocence is evidence itself created by law in his favor, whereby his innocense is established until sufficient evidence is introduced to overcome the proof which the law has thus created. This presumption of innocence on one hand, supplemented by any other evidence the defendant may have adduced, and the evidence against him on the other hand, constitutes the elements from which the legal conclusion of his guilt or innocence is by you to be drawn."

The Court refused this request, but did tell the jury (45:

"This defendant, like all defendants charged with crime, is presumed to be innocent until such time as you and each of you are convinced beyond all reasonable doubt of the truth of the charge or charges against him. This presumption of innocence goes with him and abides

with him throughout every state of the proceedings until such time as you find from the evidence or the lack of testimony, the truth of the charge or charges against him beyond a reasonable doubt."

The Court then throughout the remainder of his charge, treats on the evidence as matters arising out of the testimony of the different witnesses, but this we think does not meet our requests. The jury should have been advised that this presumption of innocence is evidence itself of the defendant's innocence, conclusive until overturned by other evidence on the part of the prosecution.

In *Coffin vs. U. S.* 156 U. S. 432 the Court, speaking through the Chief Justice on page 459 says:

> "Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn."

Requested instruction G is the next which we wish to present (44) and we believe the same was not covered by the charge given. This request was as follows:

> "The gist of the offense with which Mr. Brooks is charged is the actual state of his mind when he purchased these automobiles as to whether or not he knew such automobiles at the time he received them were stolen property. If he did not at such time know they were stolen property, then any subsequent knowledge which he might get in relation to the title to such property, or the fact that it had been theretofore stolen, could not in any manner effect him. In other words, if he received these automobiles without knowledge that they were stolen, subsequent knowledge, if he received it, that they were so stolen, would in no manner tend to establish guilt."

Again (52) at about the close of the Court's instruction, we asked the Court to advise the jury:

"That if he (Brooks) purchased the cars in Sioux City, without guilty knowledge of the fact of their having been stolen, and brought them to Sioux Falls, without such knowledge, then information subsequently imparted to him, after he had got to Sioux Falls, by the agents of the government or other source, would not make them stolen cars as to make him liable for storing them subsequent to that time."

In answering these requests, the Court (52) said to the jury:

"On the other hand, he may be guilty, under the provisions of this statute as to concealing and storing the cars, even though he did not have that information when he took the cars in Sioux City and when he drove them to Sioux Falls. Under the testimony here, it is possible, the court is of the opinion, for you find that he became acquainted with the fact that they were stolen cars, and knew that they had been transported in interstate commerce and were within the provisions of this statute and were stolen. Now, if under those circumstances, he did store and conceal them, the court is of the opinion that the second count would constitute an offense, and proof under it would be sufficient to sustain a conviction."

We have already discussed the question of when the National Government loses jurisdiction of interstate commerce by the delivery thereof at its destination, ante p. 17, and do not deem it necessary to say more here, other than that we believe our requests, even in stronger terms, should have been given.

The removal of these two cars constituted one act. The court erred, under the evidence, in ruling that the removal of each of the cars from Iowa to South Dakota could constitute a separate offense. No doubt, if they had both been loaded on a railway car and shipped in, the Court would have held it to be one shipment. If the first car had, by a towage line, pulled in the second car, with a party to steer it, would not the Court have held it to be one act? Does the fact that Mr. Brooks hired a party to drive the second car, all done at one time, make it two separate transactions? We ask you to say not.

Error in sentencing the defendant four times for the same overt act.

Article 5 of the Bill of Rights, so far as material to this case reads as follows:

"No person shall * * * be subject for the same offense to be twice placed in jeopardy of life or limb."

We have touched on this point in some other parts of our brief, namely, that the removal of the two cars constituted one act and transaction, from Iowa to South Dakota. We have also sought to point out that the concealing and storing, etc., under Section 4 of the National Motor Vehicle Theft Act can only relate to acts of third parties and not to, what we will call, the transporter. In other words, that the facts mentioned in the second counts of the respective indictment, all of which appear to have taken place after the interstate transaction had been complete, were, if connected with it at all, mere incidents of the first alleged offense.

In the case of *U. S. vs. Lee* 4 Cranch C. C.: Fed. Cases 15586 it appeared the defendant was, on a prior occasion, found guilty of stealing a pocket book of the value of seventy five cents. Later he was indicted for stealing a promissory note of the value of two hundred dollars. It appeared upon the second trial that the note was in the pocket book, for the stealing of which the defendant had already been convicted. The court ruled the doctrine of former jeopardy prevailed.

In *State vs. Agglesht* 41 Ia. 574 the defendant was indicted and convicted for passing a forged check. Later he was indicted for passing similar checks. It appeared on the second trial that they were all passed at the same time and part of the same transaction. Held, that the rule of former jeopardy prevailed.

In Re: *Haus Nielson* 131 U. S. 176 this Court held under the Anti-Ploygamy Act that a conviction under the unlawful cohabitation provision of the act was a bar to a charge of adultery.

In *Quitzow vs. State* 1 Tex. App. 47 the Court epitomizes the law by saying:

> "Though the prosecutor has a right to carve out as large an offense as the transaction will admit of, still he can carve but one."

It is true, decisions exist in some of the Circuit Courts of Appeal and have been followed at district, to the effect that the Court will not consider the claim of the defendant that he has been wrongfully convicted of a crime, where it ap-

pears that the sentence runs concurrently with another crime of which he has been justly convicted. Such decisions are justified neither by rhyme nor reason. It is cruel to say to an accused: "Because you have been convicted of one crime, it will be legal for the officers of the law to tag you with as many more crimes as may be desired, and no investigation of the question can be had unless your punishment is increased." We believe the words of Lord Erskine, in his famous address to the jury in *Rex vs. Dean of St. Asaph* would not be inappropriate to such sophistry in which he said:

> "It follows strictly the famous and respectable precedent of Rhadamanthus, judge of hell, who punishes first and afterwards institutes an inquiry into his guilt."

In the state from whence the writer comes, a convict in the penitentiary may be removed for trial during the term of his imprisonment, upon a charge either committed before his imprisonment or while serving sentence. He is entitled, upon such trial, to every safeguard which the law grants to any citizen, and no Appellate Court, we believe, would ignore error committed upon such trial, on the plea of the state that the sentence imposed did not extend the original time of his incarceration.

The Trial Court should have granted Mr. Brooks a new Trial.

The Court should have considered the affidavit of Wilson Powers (13) and granted defendant a new trial. We are aware of the rule that ordinarily the granting or refusing of a new trial is a matter of judicial discretion in the Trial Court. This case, however, is exceptional in its nature. It will be remembered that upon the trial Mr. Brooks unequovically states that he delivered to Mr. Campbell the bills of sale, which he had received from Mr. PParker for the cars at the tim ehe purchased them in Sioux City; that there were certain annotataions on these bills of sale, containing the address of the place and the parties from whom Mr. Parker got the cars. Mr. Pickett testifies that the bills of sale were produced to himself and Mr. Campbell, but at such time his attention was diverted by the arrest of one Mr. Burke, at Mr. Campbell's request. Mr. Dwight testifies that Mr. Brooks said to him in Campbell's presence, that he had given the bills of sale to Mr. Campbell, which the latter did not deny. Mr. Campbell denies having ever received or seen such bills of sale. While the lawyer may

say that the receiving or not receiving of a bill of sale in the purchase of personal property, where the possession is delivered, become immaterial with the jury, as we remember it, this was one of the strong arguments furnished by the government, particularly that Brooks could not give the number of the houses from whence the cars in Sioux City were received. This evidence was unknown to defense at the time of the trial and had it been produced, might have resulted in a contrary verdict. Under these circumstances, together with the improper admission and rejection of testimony, misbehavior on the part of the prosecuting attorney and errors in the charge given and refused, together with the fact that the receipt and movement of the two cars from Sioux City to Sioux Falls constituted a single act and not two different transactions, we assert that the Trial Court abused its discretion and should have awarded a trial *de novo*.

For the reasons pointed out as to the insufficiency of the indictment and the lack of jurisdiction of the Court, the motion in arrest of judgment should have been sustained and error was committed in overruling the same and sentencing defendant.

Respectfully submitted.

JOE KIRBY.

Attorney for Plaintiff in Error.

KIRBY, KIRBY & KIRBY,

BIELSKI, ELLIOTT & MARKER.

Counsel

Sioux Falls, South Dakota.

PETITION FOR REHEARING

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 286

RAY BROOKS,

PLAINTIFF IN ERROR,

VS.

THE UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

KIRBY, KIRBY & KIRBY,
BIELSKI, ELLIOTT & MARKER,
Attorneys for Plaintiff in Error,
Sioux Falls, South Dakota.

Mark D. Scott 3-26-25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

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RAY BROOKS,
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PETITION FOR REHEARING.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes the above named plaintiff in error, by his attorney, Joe Kirby, Esq., and respectfully asks this Honorable Court to hold up its mandate and grant him a rehearing and vacate the decision and judgment of this court entered on March 9th, 1925, for the reason that the court fails to consider and pass upon the substantial and material questions affecting the rights of this plaintiff in error and presented upon the hearing of the case, namely: That it was error on the part of the trial court to refuse to allow Mrs. Brooks, the wife, to testify in this action and holding that she was, by reason of her position, disqualified as a witness.

SUGGESTIONS.

In the course of the trial it appears (Rec. 34) that certain witnesses on the part of the Government testified to material transactions on the part of the defendant having taken place in the presence of Mrs. Brooks. She was called by the defense for the purpose of impeaching and rendering

improbable to the jury, the statements of such witnesses. This upon objection by the Government was excluded. If she was competent to testify then there is no doubt but her exclusion by the court was error. In the course of our original brief we stated that we were acquainted with the decision of this court in the case of *Jim Fuey Moy v. United States,* 254 U. S., 184, in which you held that the wife would not be competent to testify under the Judiciary Act of September 24, 1789. We also sought to call your attention to the fact that this doctrine had become obsolete in most of the states and in some of the Federal Courts; that it was only a matter of time when this Court must follow the trend of this modern rule, and expressed a wish that, as you have never hesitated to change your decisions when reason for the change is shown, especially so if the change constituted a just and humane act, it would take place in this case. It is with this end in view I call your attention to the following showing the growth of the law along similar lines:

Formerly the rule prevailing in the Federal Courts, under the Judiciary Act of 1789 and affirmed by this Court in the case of *U. S. vs. Ried,* 12 How. 361, that parties indicted jointly, even though awarded separate trials, could not be called as witnesses for their co-defendant. This might be said to be a hold over of the ancient barbarious process known to the common law of England, by which one accused of a felony could not call witnesses to testify under oath in his behalf and was refused the assistance of counsel. The latter part of such diabolical proceedings, of course, heard its death knell by the 5th and 6th Amendment to the Constitution, but the doctrine in the *Ried* case continued until 1892 when in the case of *Logan vs. U. S.* 144 U. S. 263 this Court proceeded from the ancient doctrine far enough to permit a party to be called as a witness who had been convicted of felony in a State Court, saying:

"Such conviction and sentence (in a State Court) can have no effect by way of penalty or a personal disability

or disqualification, beyond the limits of the State in which the judgment is rendered."

Shortly after the decision in the *Logan* case, this Court in the case of *Benson vs. U. S.* 146 U. S. 325, bent, but did not admit, at least, that it broke the rule in the *Ried* case by holding that a co-defendant was a competent witness *when called by the government*, the Court saying:

"The thoery of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. * * Till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence."

Looking back a third of a century to this case, the writer would be inclined to say that the Court, even at that late date, had not broken wholly from the barbarism of the common law, which allowed the king to produce witnesses against the accused, but the accused could not produce witnesses to testify under oath in his favor.

Another quarter of a century passed and in 1917 in the case of *Rosen vs. U. S.* 245 U. S. 467 this Court shook off completely the benighted shackels of the past, repudiated the rule in the Ried case, holding that the testimony of a witness, who had been convicted of a felony, should be received, his credibility being a question for the jury, the Court saying:

"In the almost 20 years which have elapsed since the decision in the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent. * * * We conclude that the dead hand of the common law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

Can there be a stronger case than the present in which the wife should be heard, at the request of the husband? A detective whom the defense claims was intoxicatd at the time, testified on behalf of the Government to a conversation which he claimed to have had with the defendant in the presence of the defendant's wife. The defendant himself denies the incriminating part of such testimony. We offered to call the wife. Why in reason should not the jury have been allowed to hear her statements, consider the probability of her story in the light of her interest and all the surrounding circumstances. As we have pointed out in the Rosen case, if she had been a convict, the credibility of her testimony would be to the jury. In fact, no reason is or can exist for excluding her testimony, unless it is, as stated in the Rosen case, by reason of "The dead hand of the common law rule." The writer knows that some day, because it is right, you will hold such testimony must be received. As long as it is right "In the light of general authority and sound reason" why let the barbarism of the past control us?

In the case of *Johnson vs. U. S.* 293 Fed. 383 we find the

wife testified on behalf of her husband, the Court of appeals merely saying:

> "His wife tends to corroborate him in the circumstances of completion of the exchange."

In *Adams vs. U. S.* 259 Fed. 214, do not the words of Justice Stone in a dissenting opinion ring true?

> "I cannot conclude that such a purpose is consummated by closing mouths which both husband and wife wish opened to prove lack of criminality by either. Is the marriage relation or is society benefited by preventing a husband or wife from coming to the aid of the other in a time of dire need, and to promote justice?"

Do not the words of Judge Wigmore in the 1st volume of his great work on evidence in Section 601, sound right when he says:

> "In short, the possibility of falsification by wife or husband is no more a reason for exclusion than the same possibility by a person pecuniarily interested; and the objectionable inconsistencies and irrational quibbles which disfgure the rule are as much apparent in the one form as in the other. * * * It deprives honest cases of upright testimony for the sake of preventing dishonest causes from using false testimony."

Respectfully submitted,

Van Emley

Attorney for Plaintiff in Error.

KIRBY, KIRBY & KIRBY
Of Counsel
Sioux Falls, South Dakota.

In the Supreme Court of the United States

OCTOBER TERM, 1924

RAE BROOKS, PLAINTIFF IN ERROR
v.
THE UNITED STATES
No. 286

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES

ARGUMENT

I

This court lacks jurisdiction to review this case

This case is brought to this court direct from the trial court on the ground that it involves Constitutional questions under Section 238 of the Judicial Code. The alleged Constitutional questions are set forth in the first assignment of error (R. p. 18), which charges (1) that the so-called National Motor Vehicle Theft Act of October 29, 1919, Chap. 89, 41 Stat. 324, upon which the indictments were founded, is unconstitutional; and (2) that the indictments upon which he was convicted do not in-

form him of the nature of the charge with the particularity which he states is required by Article VI of the Constitution.

It may be demonstrated that none of the Constitutional questions above mentioned possesses sufficient merit to support the jurisdiction of this court.

1. The National Motor Vehicle Theft Act punishes (1) the transporting or causing to be transported in interstate or foreign commerce, of motor vehicles known to have been stolen; and (2) the receiving, concealing, storing, bartering, selling, or disposition of any such known stolen vehicle moving as, or which is a part of, or which constitutes interstate or foreign commerce.

It is altogether too late to argue that while Congress may forbid under penalty, the transportation in interstate commerce of an unobjectionable woman merely because of the immoral purpose of the man in effecting her transportation (*Caminette* v. *United States,* 242 U. S. 470, 491, 492, and cases therein cited), Congress is powerless to close the channels of such commerce to the tranportation of vehicles known to have been stolen.

The contention of plaintiff in error likewise overooks such exertions of legislative authority as were upheld by this court in—

Lottery Case, 188 U. S. 321, 357;

McDermott v. *Wisconsin,* 228 U. S. 115, 135;

United States v. *Hill,* 248 U. S. 420, 423–425;
and cases cited on page 425.
United States v. *Simpson,* 252 U. S. 465;
United States v. *Ferger,* 250 U. S. 199, 203.

Moreover, the Constitutionality of the statute here involved was upheld by the Circuit Court of Appeals for the Fourth Circuit in *Kelly* v. *United States,* 277 Fed. 405, 408–409. The following excerpt from the opinion in that case appears to be unanswerable (pp. 408–409):

> To penalize the transportation of a given article is in effect to prohibit its transportation. And if the Congress may prohibit the interstate transportation of lottery tickets, *Champion* v. *Ames,* 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; of impure foods and drugs, *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364; of intoxicating liquors into a prohibition state, even for personal use, *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, 37 Sup. Ct. 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845; and of women and girls for an immoral, though noncommercial purpose, *Caminetti* v. *United States,* 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168—we perceive no reason, constitutional or other, why it may not in like manner prohibit the interstate transportation of motor vehicles known to have been stolen. As is said in *Hammer*

v. *Dagenhart*, 247 U. S. 251, 271, 38 Sup. Ct. 529, 531 (62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724), reviewing the cases cited:

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

So in this case, the "harmful results," obvious and frequently occuring, of transporting stolen motor vehicles from one state to another, can be prevented only by prohibiting altogether their interstate transportation, and such prohibition is therefore a valid exercise of the power invested in the Congress.

The statute has also been held valid by the Court of Appeals of the District of Columbia in *Whitaker* v. *Hitt*, 285 Fed. 797.

Other cases arising under this statute are—

Johnson v. *United States*, 293 Fed. 383;
~~*Friedman v. United States*, 233 Fed. 429;~~
United States v. *Hampden*, 294 Fed. 345;
Katz v. *United States*, 281 Fed. 129.

2. It is further contended that the indictments under which plaintiff in error was convicted, do not sufficiently apprise him of the accusation against him, and therefore violate his Constitutional right in that regard. There is clearly no substantial merit in such claim. The indictments

(R. pp. 2–5) set forth in certain language, the knowledge required by the statute. Every ingredient of the offenses is adequately set forth, and if further details were desired, a bill of particulars should have been requested. *Coffin* v. *United States,* 156 U. S. 432, 452. The indictment, after verdict, seems beyond attack. Moreover, plaintiff in error seems to have experienced no difficulty in preparing his defense on account of any insufficiency in the indictments.

See also *Kirby* v. *United States,* 174 U. S. 47, 63.

Finally it is not necessary here to uphold all the counts of the two indictments. The sentence imposed (R. pp. 12–13) was not in excess of that which could be imposed under a single count, therefore one good count will support the judgement of conviction. *Savage* v. *United States,* 270 Fed. 14, 17, and cases there cited.

The foregoing review and cases cited in support thereof make it plain that the Constitutional questions relied upon by plaintiff in error are too unsubstantial to support the jurisdiction of this court, and the case should therefore be transferred to the Circuit Court of Appeals for review pursuant to the provisions of Section 238a of the Judicial Code (42 Stat. 837). *Heitler* v. *United States* 260 U. S. 438.

II

The other errors complained of are typical of those usually alleged to occur in criminal trials,

and do not appear to be sufficiently prejudicial to require separate treatment.

III

It is respectfully submitted that the case should be transferred to the Circuit Court of Appeals, or the judgment of conviction affirmed.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

JANUARY, 1925.

O

BROOKS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 286. Argued January 30, 1925.—Decided March 9, 1925.

1. The Act punishing the transportation of stolen motor vehicles in interstate or foreign commerce is within the power of Congress. P. 436.
2. The third section of this act punishes anyone who transports or causes to be transported, in interstate or foreign commerce, a motor vehicle, knowing it to have been stolen, and the fourth section punishes the acts of receiving, storing, concealing, disposing of, etc., "any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen." *Held*, that § 4 is constitutional, since its purpose is merely to make more effective the regulation of § 3 and it applies only where the act of storing, concealing, etc., is a final step in the use of interstate (or foreign) transportation to promote the scheme of unlawfully disposing of the stolen vehicle and of withholding it from its owner. P. 439.
3. When the constitutional question upon which a writ of error from this court to the District Court was founded is decided against

the plaintiff in error, non-federal questions arising in the record must also be decided. P. 439.

4. In an indictment charging that defendant, knowingly, unlawfully and feloniously transported and caused to be transported in interstate commerce, between places designated, a touring automobile, (stating its value) the property of A, which said automobile theretofore (stating a time) had been stolen from A, and that the defendant did not have A's consent to transport it between the places named, "all of which he," the defendant, "then and there well knew," the concluding allegation of scienter is to be applied to the whole narrative preceding; so that the charge that defendant knew, when he transported it, that the automobile was stolen, is sufficiently definite. P. 439.

5. Where a defendant is convicted, by a general verdict, upon several counts of an indictment, and is given the same term of imprisonment under each count, to run concurrently, error in the court's charge, applicable to only one of the counts, is not ground for reversing sentence on the others. P. 440.

Affirmed.

ERROR to judgment and sentence imposed by the District Court for violation of the "National Motor Vehicle Theft Act."

Mr. Joe Kirby for plaintiff in error.

The indictments fail to inform the accused of the nature and cause of the accusation, under Article 6, and seek to deprive him of his liberty without due process of law contrary to Article 5, of the Bill of Rights.

The first counts charge Brooks with knowingly transporting the vehicle and not with transporting a vehicle known by him to have been stolen. Probably nothing is more elementary in criminal law than that the charge in the indictment must be positive, direct, certain and specific, must cover every act necessary to constitute the crime sought to be charged and that nothing can be added by inference or intendment and meet the constitutional requirements. In other words, there must be an accusation, not a dragnet. 1 Chitty C. L. Page 171; 1 Bish. N. C. P. §§ 508–520; 1 Wharton C. P. (Kerr)

§ 194. The same criticism applies to the second count. This guilty knowledge must have been in the mind of the defendant under the first count at the time he transported the car and under the second count at the time he stored or concealed it. It should have been, but has not been, alleged in the indictment. *Peterson* v. *United States*, 213 Fed. 920; *Fredericks* v. *Tracy*, 33 Pac. (Calif.) 750; *Sir Nicholas Pointz*, Cro. Jac. 214; *United States* v. *De Barre*, 6 Biss. 358; 2 *Bishop* N. C. L. § 1140; *Foster* v. *State*, 106 Ind. 272.

The National Motor Vehicle Theft Act is not authorized under the commerce clause of the Constitution and is in conflict with Art. 10 of the Constitution. *Dobbins* v. *Comm'rs.*, 16 Pet. 435 *Buffington* v. *Day*, 11 Wall. 113. The Act in question does not regulate interstate commerce. *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Hammer* v. *Dagenhart*, 247 U. S. 251. When this Court upheld the constitutionality of the White Slave Law, *Hoke* v. *United States*, 227 U. S. 308; the Pure Food and Drug Act, *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; and the Anti-Lottery Act, *Champion* v. *Ames*, 188 U. S. 321, it went to the very extreme limit.

Even if Congress possessed the power to enact § 3 of the act in question, still there must be some point in the procedure where this interstate control will cease, where the State can again assume jurisdiction over the vehicle. In interstate commerce this has been, we believe, always determined by the article reaching its primary destination. In the present case, the destination in the movement of the cars was the defendant's garage in Sioux Falls. Whatever was done with the cars after they reached their destination in interstate movement would be clearly beyond the federal jurisdiction and a question solely for the state courts. In fact we think a careful reading of § 4 will disclose that such was the purpose of Congress. By the act of June 3, 1902, 32 Stat. 285, Congress sought to assume jurisdiction over migratory and

insectivorous birds. In *United States* v. *McCullagh,* 221 Fed., 288, the District Court held the act unconstitutional, pointing out that the power to pass such an enactment was not conferred either by the general welfare clause or by the interstate commerce clause. The same view was strongly expressed in *State* v. *Sawyer,* 113 Me. 458.

The court below also erred in excluding the wife of the defendant, when called as a witness for the purpose of contradicting and impeaching the testimony of the government witnesses, whose statements were given in her presence. *Johnson* v. *United States,* 293 Fed. 383; *Jin Fuey Moy* v. *United States,* 254 U. S. 189; *Rosen* v. *United States,* 245 U. S. 467; *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U. S. 263; *Benson* v. *United States,* 146 U. S. 325; *Adams* v. *United States,* 259 Fed. 214; Wigmore on Evidence § 601.

Mr. Assistant Attorney General Donovan, with whom *Mr. Solicitor General Beck* and *Mr. Harry S. Ridgely* were on the brief, for the United States.

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a writ of error to the District Court for the District of South Dakota brought by Rae Brooks to reverse a judgment against him of conviction under two indictments for violation of the Act of Congress, of October, 1919, known as the National Motor Vehicle Theft Act. The writ of error issued under § 238 of the Judicial Code, because the case involves the construction or application of the Constitution, in that the chief assignment of error is the invalidity of the Act. The Act became effective October 29, 1919 (41 Stat. 324), and is as follows:

"Chap. 89.—An Act to punish the transportation of stolen motor vehicles in interstate or foreign commerce.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the National Motor Vehicle Theft Act.

"Sec. 2. That when used in this Act:

"(a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;

"(b) The term 'interstate or foreign commerce', as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

"Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The objection to the Act can not be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public,

within the field of interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 215. In *Reid* v. *Colorado,* 187 U. S. 137, it was held that Congress could pass a law excluding diseased stock from interstate commerce in order to prevent its use in such a way as thereby to injure the stock of other States. In the *Lottery Case,* 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. In *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which, if sold in other States than the one from which they were transported, would deceive or injure persons who purchased such articles. In *Hoke* v. *United States,* 227 U. S. 308 and *Caminetti* v. *United States,* 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. In *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311, it was held that Congress had power to forbid the introduction of intoxicating liquors into any State in which their use was prohibited, in order to prevent the use of interstate commerce to promote that which was illegal in the State. In *Weber* v. *Freed,* 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralizing effect of such exhibitions in the State of destination.

In *Hammer* v. *Dagenhart*, 247 U. S. 251, it was held that a federal law forbidding the transportation of articles manufactured by child labor in one State to another was invalid, because it was really not a regulation of interstate commerce but a congressional attempt to regulate labor in the State of origin, by an embargo on its external trade. Articles made by child labor and transported into other States were harmless, and could be properly transported without injurying any person who either bought or used them. In referring to the cases already cited, upon which the argument for the validity of the Child Labor Act was based, this Court pointed out that, in each of them, the use of interstate commerce had contributed to the accomplishment of harmful results to people of other States, and that the congressional power over interstate transportation in such cases could only be effectively exercised by prohibiting it. The clear distinction between authorities first cited and the *Child Labor Case* leaves no doubt where the right lies in this case. It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture, have greatly encouraged and increased crimes. One of the crimes which have been encouraged is the theft of the automobiles themselves and their immediate transportation to places remote from homes of the owners. Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other State, and their sale or other disposition far away from the owner and his neighborhood, have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny. The quick passage of the machines into another State helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction

and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.

The fourth section merely makes more effective the regulation contained in the third section. The third section punishes the transportation of a stolen automobile with knowledge of the theft. The fourth section punishes the receipt, the concealment, the storing, the bartering, the sale, or the disposition of such stolen vehicle, moving as interstate commerce, or as a part thereof, with knowledge of its having been stolen. Of course, this section can and does apply only to the storing or concealment of a stolen automobile with knowledge of its theft, as a final step in the use of interstate transportation to promote the scheme of its unlawful disposition and the withholding of it from its owner. For these reasons, we think that §§ 3 and 4 are within the power of Congress.

The constitutional question brought this case directly to this Court. Being here, the other questions arising on the record must be decided. *Pierce* v. *United States,* 252 U. S. 239; *Brolan* v. *United States,* 236 U. S. 216.

It is objected that the counts of the indictments failed to inform the defendant of the nature and cause of the accusation. There were two indictments with two counts each. One charged violation of § 3 in the first count and of § 4 in the second count, as to one automobile. The second indictment made the same charges as to a second automobile. The charge in one, under § 3, was that defendant "knowingly, unlawfully and feloniously did transport and cause to be transported in

interstate commerce" from Sioux City, Iowa, to Sioux Falls, South Dakota, a touring automobile, describing it as of $1,000 value, the property of and belonging to one W. C. Wendt of Omaha, Nebraska, which said automobile theretofore, on September 7th, A. D. 1921, had been stolen from Wendt, and that the defendant did not have the consent of the owner to transport it from Sioux City to Sioux Falls, "all of which he, the said Rae Brooks, then and there well knew." The argument is that this does not sufficiently charge that the defendant knew that the automobile was stolen when he transported it. We think it does; that it is a reasonable construction to hold that the last words refer to the whole previous narration.

The third objection is that there is no evidence of the defendant's guilt, and that the jury should have been so advised. We have read the evidence and read the charge of the court. The charge of the court submitted the issues properly to the jury except possibly in one respect, to which we shall refer.

It appeared that Brooks, the defendant, owned a garage in Sioux Falls, South Dakota, and that he went to Sioux City, Iowa, and obtained these two automobiles, which had been stolen, and transferred them to Sioux Falls. We can not say that the circumstances were not such that a jury might properly infer that the defendant knew that they were stolen and had acquired them and transported them to South Dakota for the purpose of profiting by the transaction in stolen goods. It is said that there was no evidence after the cars were stored in Sioux Falls that the defendant made any effort to secrete, conceal or store them with guilty knowledge. It is not necessary for us to examine into this question or another mooted by the defendant's counsel. He contends that under the charge of the court the jury might have been led to convict the defendant on the second count in each indict-

ment, on the theory that he became aware of the stolen character of the cars only after he reached Sioux Falls, and stored them after he became aware of their stolen character in Sioux Falls. This, he says, was an erroneous application of the 4th section, because, if his connection with the transportation was innocent, his subsequent criminal concealment of the stolen property would be disconnected with interstate commerce and be only a crime against the State. We do not think it necessary to pass on this question, for the reason that the verdict of the jury was general, that the defendant was found guilty on both the counts of each of the two indictments and that the defendant was sentenced to eighteen months on each indictment and each count, the sentences to run concurrently. As the convictions can be sustained on the first count in each indictment under the verdict, there is no ground for reversing the case because of error in charging as to the second count. *Claassen* v. *United States,* 142 U. S. 140, 146; *Evans* v. *United States,* 153 U. S. 608, 609; *Abrams* v. *United States,* 250 U. S. 616, 619; *Pierce* v. *United States,* 252 U. S. 239, 252.

There are some objections made to the form of some questions put by the District Attorney. We do not think they are shown to have been sufficiently prejudicial to justify a new trial.

The judgment of the District Court is

Affirmed.